In the Supreme Court of the United States.

OCTOBER TERM, 1917.

EX PARTE: IN THE MATTER OF PARK & TILFORD, PETITIONER. | No. 24, Original.

RETURN TO RULE TO SHOW CAUSE.

Come now the undersigned respondents in the above-entitled action, and for return to the rule issued by this Honorable Court on June 11, 1917, to show cause why a writ of mandamus should not be issued against them, say:

Certain merchandise was imported by the petitioner, subject to a certain ad valorem rate of duty under the Tariff Act of 1913.

The Collector of Customs at the Port of New York assessed and liquidated the duties on various dates from January 28, 1916, to February 4, 1916, at the entered value, acting in pursuance, as he claimed, of the following portion of the act of October 3, 1913 (38 Stat. 114, 181, 184, c. 16, Sec. III, Par. I):

> * * * The duty shall not, however, be assessed in any case upon an amount less than the entered value, unless by direction of the Secretary of the Treasury in cases in which the importer certifies at the time of entry that

> the entered value is higher than the foreign market value and that the goods are so entered in order to meet advances by the appraiser in similar cases then pending on appeal for reappraisement, and the importer's contention shall subsequently be sustained by a final decision on reappraisement, and it shall appear that the action of the importer on entry was taken in good faith, after due diligence and inquiry on his part, and the Secretary of the Treasury shall accompany his directions with a statement of his conclusions and his reasons therefor.

At the time of entry the importers in each instance made an addition to the invoice value to make market value, stating the additions were made to meet advances in similar cases then pending on appeal for reappraisement.

Subsequently the merchandise, on appeal for reappraisement, and on further appeal for reappraisement, was appraised at a value which differed from both the invoice value and the entered value.

The Collector, in his report of April 4, 1916 (see Record attached to Motion for Leave to File Petition for Writ of Mandamus and Petition, pp. 40–41, hereinafter in this Return termed "Record"), stated that:

> as the final reappraised value was less than the entered value but not as low as the invoice value this office assessed duty upon the entered value under the provisions of Par. I of Sec. III.

The petitioner, under date of February 24, 1916 (Rec. 67), requested the Secretary of the Treasury to direct the reliquidation of the entries. The Secretary of the Treasury, under date of March 2, 1916 (Rec. 71–72), replied to the petitioner as follows:

> You are advised that in all cases where the importer has failed to make a specific contention as to market value, the Department regards the contention as being for invoice value; and where the final reappraised value is below the entered value but not as low as the value contended for by the importer, it is the practice of the Department to decline to authorize a reduction of the entered value, on the ground that the importer's contention has not been sustained. This practice is based upon the Department's knowledge of the purpose and intent of the law, and is of such long standing that it will not make any change therein.
>
> You are advised therefore, that if the entries enumerated in your petition come within the class mentioned above, the Department's final action with reference thereto, would necessarily be in accordance with its practice outlined above.

No specific directions of any kind were addressed to the Collector by the Secretary of the Treasury in this case prior to the assessment and liquidation of the duty by the Collector. The Secretary of the Treasury, however, as was well known, had announced his decision in general that he would not, in any case, issue a direction favorable to importers

under said paragraph I unless the final reappraisement of the merchandise, in any case, sustained the exact value which the importers should specify in their certificate filed under the paragraph at the time of making entry; and the Secretary had held that if the importers failed to specify the value of the merchandise in the certificate so filed by them, the invoice should be understood to be their claim in that particular. See T. D. 34806; T. D. 36221.

The Collector, as above stated, having received no direction from the Secretary of the Treasury, as required by said paragraph I, made his liquidation at the entered value.

The petitioner, under date of February 26, 1916, duly filed a protest against the liquidation, in the following words (Rec. 39–40):

> * * * we protest against your decision as to the rate and amount of duties * * *.
>
> * * * we claim that the duty should be computed upon the value of the goods as ascertained by final decision on reappraisement.
>
> We claim the Secretary of the Treasury errs in holding that he has no power, as matter of law, under Section III, paragraph I of the said act, to direct that duty be assessed upon an amount less than the entered value unless the invoice value is sustained by final decision on reappraisement.
>
> We claim under the law it is enough to confer such power on the Secretary if the importer's contention is sustained by a final

> decision on reappraisement that the "entered value is higher than the foreign market value."

This protest was in accordance with the provisions of Section III, Paragraph N, of the Act of 1913, which provided (38 Stat. 187):

> That the decision of the collector as to the rate and amount of duties chargeable * * * shall be final and conclusive * * * unless the * * * importer * * * shall * * * file a protest or protests in writing with the collector, setting forth therein distinctly and specifically * * * the reasons for his objections thereto * * *.
>
> Upon such payment of duties, protest, and deposit of protest fee, the collector shall transmit the invoice and all papers and exhibits connected therewith to the board of nine general appraisers, for due assignment and determination as provided by law.

The matter of the protest was heard by the Board of General Appraisers, and that Board, under date of May 8, 1916, overruled the protest and sustained the action of the Collector in liquidating the entry of the goods at their entered value, the decision being as follows (Rec. 3):

> This protest is against the action of the collector in the liquidation of an entry in which the importer had invoked the provisions of paragraph "I," Section III, Tariff Act of 1913, and entered the merchandise higher than it was invoiced because of a reappraisement then

> pending. All of the questions here involved were considered by this Board in *Mills & Gibb's* case, G. A. 7893 (T. D. 36347), and the conclusion reached in that case must be controlling in the case at bar. For the reasons given in that decision the protest is overruled.

The Board of General Appraisers stated that the reasons for their decision in this case were contained in the decision rendered by the board in *Mills & Gibb's* case, G. A. 7893 (T. D. 36347). These reasons, as stated in the latter case, were as follows:

> In the case at bar it is sought to compel the collector to act in a case where the statute in positive terms prohibits him from acting, except under the direction of the Secretary of the Treasury, in a case where no such direction has been given by the Secretary. In other words, a decision in favor of the importers in this case would, we think, compel this tribunal to either require the collector to do something in direct and positive contravention of law, or that decision must reach back beyond the collector to the Secretary and compel the Secretary to perform what it is claimed is his statutory duty. The first would be manifestly wrong, and the latter, we think, is beyond the power and jurisdiction of this board.
>
> The protest is overruled.

An appeal was taken from this decision of the Board of United States General Appraisers to the Court of Customs Appeals, in accordance with the provisions of Section III, Paragraph N, of the Tariff

Act of 1913, which provided that the determination of the Board of General Appraisers—

> shall be final and conclusive upon all persons interested therein, and the record shall be transmitted to the proper collector or person acting as such, who shall liquidate the entry accordingly, except in cases where an appeal shall be filed in the United States Court of Customs Appeals within the time and in the manner provided for by law.

The appeal was heard by the Court of Customs Appeals (before Judges Montgomery, Smith, Barber, De Vries, and Martin), upon oral argument on October 11, 1916, by counsel for the petitioner and by the Assistant Attorney General of the United States, in a case entitled *Park & Tilford* v. *United States*, No. 1715, Appeal from United States Board of General Appraisers, Abstract No. 39704. The Court of Customs Appeals rendered a decision upon April 11, 1917, the opinion of the Court being delivered by Judge Martin, and a dissenting opinion being delivered by Judge De Vries. (Rec. 6–12.)

The Court of Customs Appeals affirmed the decision of the Board of United States General Appraisers, which decision (as above stated) overruled the protest of the petitioner against the action of the Collector in liquidating the entry of the goods at their entered value. The decision of that court, accordingly, sustained the action of the Collector in liquidating the entries in the manner in which he had so liquidated them.

The Court of Customs Appeals, in the opinion delivered by Judge Martin, stated that (Rec. 11):

> * * * the present issue is identical with that which the court has decided concurrently herewith in the case of Mills & Gibb *v.* United States, save for two points of difference.

After considering these two points of difference, this court concluded its opinion as follows (Rec. 12):

> We do not think that either of these considerations serves to differentiate this case from the Mills & Gibb case aforesaid, since the decision in that case rests upon the view that the collector is bound by the paragraph in question to assess duty in every case upon an amount not less than the entered value of the merchandise unless specifically directed otherwise by the Secretary in certain classes of cases, and that the refusal of the Secretary in any case to so direct the collector is not reviewable upon appeal by the board or this court.
>
> The decision of the board is accordingly *affirmed.*

In the case of *Mills & Gibb* v. *United States,* the decision in which was thus referred to in this opinion, this court had affirmed the decision of the Board of United States General Appraisers sustaining the liquidation by the collector of goods at their entered value, and had stated as follows (Rec. 86, 87, 89, 90):

> In the present case accordingly the Secretary refused to direct the collector to assess duty upon an amount less than the entered

value of the merchandise, but to the contrary instructed him to assess duty upon the full entered value thereof. This instruction, of course, did not arm the collector with any new authority in the premises, but simply required him to perform whatever duty was imposed upon him by statute in the absence of special instructions in behalf of the importers. Under these circumstances the collector was bound by the letter of the law at least to assess duty upon the entered value of the merchandise, and this he did.

* * * * *

On the other hand the authority granted to the Secretary by the paragraph in question is distinctly denied to the collector. That officer is neither empowered nor permitted to examine or decide as to the facts upon which the relief of the importers is made to depend. The paragraph expressly provides that the collector shall in no case assess duty upon an amount less than the entered value, unless directed to do so in certain cases by the Secretary. The assessment in the present case therefore does not rest upon the instructions addressed to the collector by the Secretary in his first letter, above copied, but upon the imperative mandate of the law which defines the duties of the collector in the absence of a direction by the Secretary for a reduced assessment. And it should be remembered in this connection that it is the action or decision of the collector which may be challenged by protest, and that this makes up the issue which

> goes to the board for decision, and which may be appealed to this court. (Par. N of sec. 3, tariff act of 1913.)

In the case of *Mills & Gibb* v. *United States* Judge De Vries delivered a dissenting opinion (Rec. 91–128).

Your respondents deny the allegation contained in paragraph 8 of the petitioner's petition for writ of mandamus (Rec. 6) to the effect that—

> on the ground of lack of jurisdiction, the said United States Court of Customs Appeals refused to pass upon the merits of the questions presented by the case of your petitioner;

and state that they had jurisdiction of the appeal from the action of the Board of United States General Appraisers, filed by virtue of Section III, Paragraph N, of the Act of 1913, and that they did assume jurisdiction in the case, heard oral arguments from counsel, and decided all the questions of law and fact therein presented, such decision, however, being adverse to the contentions made by the petitioner on the argument and brief of its counsel. Your respondents further show that their decision, to the effect that the liquidation made by the collector was final, was based upon their construction of the provisions of Paragraph I of Section III of said Tariff Act of 1913.

Your respondents further show that, having had and having exercised jurisdiction in the case and having decided the question presented by the appeal (viz, the correctness of the decision of the Board of

General Appraisers in affirming the liquidation made by the Collector), a writ of mandamus if issued could do no more than direct this court to take action which it has already taken.

Respectfully submitted.

ROBERT M. MONTGOMERY,
Presiding Judge,
United States Court of Customs Appeals.

JAMES F. SMITH,
ORION M. BARBER,
GEO. E. MARTIN,
Associate Judges,
United States Court of Customs Appeals.

JOHN W. DAVIS,
Solicitor General.

CHARLES WARREN,
Assistant Attorney General,
for the respondents.

OCTOBER, 1917.

○

Office Supreme Court, U. S.
FILED
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JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1917.

No. 24 Original.

Ex Parte: In the Matter of PARK & TILFORD,
Petitioner.

ANSWER TO RETURN—NOTICE OF HEARING.

PARK & TILFORD,
Petitioner,

By HATCH & CLUTE,
Attorneys,
100 Broadway,
New York, N. Y.

EDWARD S. HATCH,
VINCENT P. DONIHEE,
Counsel.

The Dispatch Printery & Binding Corporation
New York

IN THE

Supreme Court of the United States

OCTOBER TERM, 1917.

No. 24 Original.

Ex Parte: In the Matter of PARK & TILFORD,
Petitioner.

ANSWER TO RETURN AND NOTICE OF HEARING.

Comes now the Petitioner, PARK & TILFORD, in the above entitled action and:

Alleges that the *denial by the respondents* that the respondents refused on the ground of lack of jurisdiction to pass upon the merits of the case of your petitioner, and likewise the allegation that a writ of mandamus if issued could do no more than direct the United States Court of Customs Appeals to take action which it has already taken, are *conclusions of law*, as this petitioner is advised by its legal counsel and verily believes, and this petitioner further:

Denies the allegation of the said return of the respondents herein wherein respondents say that they did assume jurisdiction in the case and did decide all the questions of law and fact therein presented.

And this petitioner in support of all this relies upon and refers to the Record:

And this petitioner gives notice, that it will call this cause up for submission on oral argument at the opening

of this Honorable Court on the 15th day of October, 1917, or as soon thereafter as counsel can be heard.

Dated, October 6th, 1917.

Respectfully submitted,

PARK & TILFORD,
By JAMES W. BUCKNER,
Second Vice-President.

By HATCH & CLUTE,
Attorneys for Petitioner,
100 Broadway,
New York City.

EDWARD S. HATCH,
VINCENT P. DONIHEE,
of Counsel for Petitioner.

State of New York }
County of New York. } ss.:

JAMES W. BUCKNER, being duly sworn, says: that he is the Second Vice-President of PARK & TILFORD, the corporation described in and which is the petitioner in the above entitled action. That he has read the foregoing answer to the return herein, and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters and things therein stated to be alleged on information and belief, and that as to those matters he believes it to be true; that the reason why this verification is made by deponent is that the petitioner is a corporation as set forth in the petition herein, and your deponent is one of its officers as aforesaid.

JAMES W. BUCKNER.

Sworn to before me, this 6th day of October, 1917. }

EDWARD J. GAFNEY,
Notary Public,
Kings County.
Certificate filed in New York County.

FILED
JUN 18 1917
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

No. 24 Original.

Ex Parte: In the Matter of PARK & TILFORD,
Petitioner.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS AND PETITION

PARK & TILFORD,
Petitioner,

By HATCH & CLUTE,
Attorneys,
100 Broadway,
New York, N. Y.

EDWARD S. HATCH,
VINCENT P. DONIHEE,
Counsel.

The Dispatch Printery & Bindery Corporation
New York

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

No. ——— Original.

Ex Parte: In the Matter of PARK & TILFORD,
Petitioner.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS

The petitioner, Park & Tilford, a corporation organized under the laws of the State of New York, respectfully asks the Court for leave to file the petition presented herewith, wherein a writ of mandamus is sought directed to the Honorable United States Court of Customs Appeals, and the Honorable ROBERT M. MONTGOMERY, as Presiding Judge, JAMES F. SMITH, ORION M. BARBER, MARION DE VRIES, and GEORGE E. MARTIN, as Associate Judges of said Court, at Washington, D. C.

This 31st day of May, 1917.

PARK & TILFORD,
Petitioner,

By HATCH & CLUTE,
Attorneys.

EDWARD S. HATCH,
VINCENT P. DONIHEE,
of Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. ——— Original.

Ex Parte: In the Matter of PARK & TILFORD,
Petitioner.

PETITION FOR WRIT OF MANDAMUS

To the Honorable the Supreme Court of the United States of America:

Your petitioner, Park & Tilford, respectfully states:

1.

That your petitioner is and at all times hereafter mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of New York, and having its principal office and place of business at New York City, in the State of New York.

2.

That prior to May 8th, 1916, your petitioner duly brought before the Board of United States General Appraisers in the manner provided by law and in accordance therewith, a case of protest against the action of the Collector of Customs of the Port of New York in a case involving the question whether the Secretary of the Treasury of the United States had performed his statutory duty

under the provisions of paragraph "I", Section III of the Tariff Act of 1913, and on said May 8, 1916, said Board of United States General Appraisers handed down the following determination and decision of said case, to wit:

"Board of United States General Appraisers.

May 8, 1916.

In the matter of protest of Park & Tilford, No. 801869/5590, against the decision of the Collector of the Port of New York. Board three.

Before Waite and Hay, General Appraisers.

Hay, General Appraiser, delivered the opinion of the Board:

This protest is against the action of the Collector in the liquidation of an entry in which the importer had invoked the provisions of paragraph "I," Section III, Tariff Act of 1913, and entered the merchandise higher than it was invoiced because of a re-appraisement then pending. All of the questions here involved were considered by this Board in *Mills & Gibb's* case, G. A., 7893 (T. D., 36347), and the conclusion reached in that case must be controlling in the case at bar.

For the reasons given in that decision the protest is overruled.

BYRON S. WAITE,

EUGENE G. HAY,

Board of U. S. General Appraisers."

3.

That very shortly prior to the handing down of this decision and on April 21st, 1916, the same Board had decided Mills & Gibb's case referred to in the above quoted decision, and there decided as set forth correctly in the syllabus of their decision reported in full in the official Treasury Decisions (T. D., 36347—G. A., 7893), such syllabus being as follows:

"T. D., 36347—G. A., 7893.

Legality of Liquidation—Paragraph I of Section 3, Act of 1913, Construed.

1. Action of the Secretary of the Treasury Final.

The provisions of paragraph I of Section 3, Tariff Act of 1913, relative to the assessment of duty on merchandise at a less value than the entered value imposes upon the Secretary a discretionary duty, and his action is final.

2. Jurisdiction of the Board of United States General Appraisers.

If the duty imposed upon the Secretary in paragraph I of Section 3, Tariff Act of 1913, is to be held to be mandatory, the Board of United States General Appraisers has no jurisdiction in a case where the Secretary has failed or refused to take the action contemplated by the law, as the Collector is without power to assess the merchandise at other than the entered value except upon the direction of the Secretary."

4.

The following is the provision of paragraph I of Section 3, Tariff Act of 1913 and the statute upon which the act of the Collector and the contention of the importer rests:

"* * * *The duty shall not, however, be assessed in any case upon an amount less than the entered value, unless by direction of the Secretary of the Treasury in cases in which the importer certifies at the time of entry that the entered value is higher than the foreign market value and that the goods are so entered in order to meet advances by the appraiser in similar cases then pending on appeal for re-appraisement, and the importer's contention shall subsequently be sustained by a final decision on re-appraisement, and it shall appear that the*

action of the importer on entry was taken in good faith, after due diligence and inquiry on his part, and the Secretary of the Treasury shall accompany his directions with a statement of his conclusions and his reasons therefor."

5.

That the facts in the case of your petitioner as to the re-appraisement and the result thereof and of the proceedings before and the action of the Secretary of the Treasury, are stated and set forth in the opinion handed down in your petitioner's case by the Honorable United States Court of Customs Appeals and the record of the said case before it, both hereinafter referred to and set forth.

6.

That in due time as provided by law and in the manner and in accordance with the statutes in such case made and provided, your petitioner duly appealed to the United States Court of Customs Appeals from the decision of the Board of United States General Appraisers in said case of your petitioner and brought its said case on appeal before said Court, before which it was argued.

7.

That a complete copy of the Record of the said case of your petitioner before the said United States Court of Customs Appeals is hereto annexed as "Schedule A," of this petition.

8.

That, as will appear from the opinions, prevailing and dissenting, handed down in the case of your petitioner, by the United States Court of Customs Appeals, the said Court held that the refusal of the Secretary of the Treasury

to direct the Collector to assess duty upon less than the entered value was not reviewable upon appeal by the Board of United States General Appraisers or the United States Court of Customs Appeals, notwithstanding the facts that your petitioner's goods were entered at a value higher than that stated in the invoice, with a certificate that this was done to meet advances made by the appraiser in similar pending cases, and the final appraisement was between the invoice and entered values, and on the ground of lack of jurisdiction, the said United States Court of Customs Appeals refused to pass upon the merits of the questions presented by the case of your petitioner.

9.

That the following are correct copies of the prevailing and dissenting opinions handed down in the case of your petitioner by the said United States Court of Customs Appeals, to wit:

(T. D. 37165.)

Legality of liquidation.

PARK & TILFORD *v.* UNITED STATES (No. 1715).

CONSTRUCTION, PARAGRAPH I OF SECTION 3, TARIFF ACT OF 1913—ENTERED, HIGHER THAN MARKET, VALUE.

Where goods were entered at a value higher than that stated in the invoice, with a certificate that this was done to meet advances made by the appraiser in similar pending cases, and the final appraisement was between the invoice and entered values, the refusal of the Secretary of the Treasury to direct the collector to assess duty upon less than the entered value is not reviewable upon appeal by the Board of United States General Appraisers or the United States Court of Customs Appeals.—*Mills & Gibb v. United States* (8 *Ct. Cust. Appls.*—; T. D. 37164).

United States Court of Customs Appeals,
April 11, 1917.

APPEAL from Board of United States General Appraisers, Abstract 39704.

[Affirmed.]

Hatch & Clute (*Edward S. Hatch* and *Walter F. Welch* of counsel) for appellants.

Bert Hanson, Assistant Attorney General, for the United States.

[Oral Argument Oct. 11, 1916, by Mr. Welch and Mr. Hanson.]

Before MONTGOMERY, SMITH, BARBER, DE VRIES and MARTIN, *Judges*.

MARTIN, *Judge*, delivered the opinion of the court:

The merchandise in this case consisted of perfumes and toilet articles which were imported under the tariff act of 1913, and which were subject to a certain ad valorem rate of duty. Duty was assessed at that rate upon the merchandise at its entered value. The importers, however, claimed assessment upon the merchandise at its value as decided by a final reappraisement thereof, this being less in amount than the entered value. This claim was made under the closing provision of paragraph I of section 3 of the act, which reads as follows:

The duty shall not, however, be assessed in any case upon an amount less than the entered value, unless by direction of the Secretary of the Treasury in cases in which the importer certifies at the time of entry that the entered value is higher than the foreign market value and that the goods are so entered in order to meet advances by the appraiser in similar cases then pending on appeal for reappraisement, and the importer's contention shall subsequently be sustained by a final decision on reappraisement, and it shall appear that the action of the importer on entry was taken in good faith after

due diligence and inquiry on his part, and the Secretary of the Treasury shall accompany his directions with a statement of his conclusions and his reasons therefor.

It appears from the record that the importers entered the merchandise upon an invoice which stated a gross price and allowed 15 per cent deduction therefrom. At entry the importers advanced this value by reducing the deduction to 6 per cent, which was, of course, equivalent to an advance of 9 per cent upon the net invoice price of the merchandise.

Concurrently with the entry the importers filed a certificate under paragraph I, supra, in the following terms:

I, Jesse Howell, treasurer of the corporation of Park & Tilford, hereby certify that the entered value of the merchandise mentioned below is higher than the foreign market value, and that the goods are so entered in order to meet advances by the appraiser in similar cases now pending on appeal for reappraisement. The similar cases now pending are entries Nos. 109522 at the port of New York. I contend that duty should be assessed on the basis of the value shown below as the foreign market value.

The local appraiser appraised the merchandise at the entered value, that is, at the gross invoice price, less 6 per cent. Thereupon the importers appealed for a reappraisement. The single general appraiser, upon appeal, likewise appraised the merchandise at the entered value. The importers then appealed for a re-reappraisement. Upon this appeal the board of appraisers appraised the merchandise at the gross invoice price, less 6 per cent, 2 per cent, and 5 per cent, being practically a deduction of 12½ per cent therefrom. This appraisement was of course final, and it differed from both the invoice and entered values aforesaid, being 2½

per cent more than the invoice price of the merchandise and 6½ per cent less than the entered value thereof.

No specific directions of any kind were addressed to the collector by the Secretary of the Treasury in this case prior to the assessment of duty upon the merchandise, but the Secretary, as was well known, had announced the decision that he would not in any case issue a direction favorable to importers under the paragraph in question unless the final reappraisement of the merchandise in the case sustained the exact value which the importers should specify in their certificate under the paragraph. Furthermore, the Secretary had held that if the importers in any such case failed to specify the value of the merchandise in the certificate thus filed by them, the invoice price should be understood to be their claim in that particular. See T. D. 34806, T. D. 36221, and extract from department letter, infra. According to this view of his duties the Secretary of the Treasury would not have been justified in this case in directing the collector to assess duty upon less than the entered value of the merchandise, since the final appraisement of the merchandise while less than the entered value was not as low as the invoice price thereof.

Consistently with the foregoing view of the law, and wholly without specific directions in respect to this entry, the collector assessed duty upon the present merchandise at its entered value.

The importers filed their protest against the assessment, claiming as follows:

* * * We claim that duty should be computed upon the value of the goods as ascertained by final decision on reappraisement.

We claim the Secretary of the Treasury errs in holding that he has no power, as matter of law,

under section 3, paragraph I of the said act, to direct that duty be assessed upon an amount less than the entered value, unless the invoice value is sustained by final decision on reappraisement.

We claim under the law it is enough to confer such power on the Secretary if the importers' contention is sustained by a final decision on reappraisement that the entered value is higher than the foreign market value."

A short time subsequent to the liquidation the importers filed with the Secretary a petition wherein they fully recited the facts in the case and requested him to issue directions to the collector to reliquidate the entry in question, and to assess duty upon the reappraised value of the merchandise instead of the entered value. The Secretary refused this request, stating his reasons in the following language:

You are advised that in all cases where the importer has failed to make a specific contention as to market value, the department regards the contention as being for the invoice value; and where the final reappraised value is below the entered value, but not as low as the value contended for by the importer, it is the practice of the department to decline to authorize a reduction of the entered value, on the ground that the importer's contention has not been sustained. This practice is based upon the department's knowledge of the purpose and intent of the law, and is of such long standing that it will not make any change therein.

You are advised therefore that if the entries enumerated in your petition come within the class mentioned above, the department's final action with reference thereto would necessarily be in accordance with its practice outlined above.

In a subsequent letter to the importers the Secretary enlarged upon the foregoing views as follows:

The statute in question requires as a condition precedent to relief in such cases that an importer

shall have made his advances after due diligence and inquiry on his part, relative, of course, to the market value of the merchandise; and therefore contemplates that the importer, having made the inquiry required, has obtained knowledge relative to the market value, and should make his entry accordingly. If such diligence has been exercised, and inquiry made, the importer certainly is in a position to state definitely at the time of entry what he believes to be the market value of the merchandise on which he has made advances to meet the previous advances by the appraiser; and in all cases where he fails to state what he believes the market value to be it has been the practice of the department to construe his contention for the invoice value.

Reply to your letter has been delayed pending the issuance of T. D. 36221, which covers fully the conditions presented in the petition of the importers; and, in accordance with the principles set forth therein, you are again advised that if the entries enumerated in the petition were reappraised at values below the entered values but not as low as the invoice values, no specific contention for values having been made by the importers at the time of entry, the department necessarily would have to deny an application for reduction of the entered values of the entries, in accordance with its previous practice.

The protest was submitted to the Board of General Appraisers and was overruled, from which decision the importers appeal.

The foregoing statement discloses the fact that the present issue is identical with that which the court has decided concurrently herewith in the case of Mills & Gibb *v.* United States, save for two points of difference. One of these is the fact that in that case the Secretary specifically denied the importers' contention for assessment upon the reappraised value instead of the entered value, and made this decision known to the collector before he assessed duty upon the merchandise. This was not done in

the present case. The second point of difference appears in the fact that in the former case the importers in the certificate filed by them at entry specified the exact sum which they claimed to be the actual market value of the merchandise, whereas, in the present case the importers simply certified that the entered value was higher than the actual market value of the merchandise without stating specifically in the certificate what that actual market value was.

We do not think that either of these considerations serves to differentiate this case from the Mills & Gibb case aforesaid, since the decision in that case rests upon the view that the collector is bound by the paragraph in question to assess duty in every case upon an amount not less than the entered value of the merchandise unless specifically directed otherwise by the Secretary in certain classes of cases, and that the refusal of the Secretary in any case to so direct the collector is not reviewable upon appeal by the board or this court.

The decision of the board is accordingly *affirmed*.

DISSENTING OPINION.

DE VRIES, *Judge*: For the reasons expressed in the dissenting opinion in *Mills & Gibb* v. *United States* (8 Ct. Cust. Appls.,—; T. D. 37165), decided herewith, I am unable to concur with my colleagues herein, and therefore dissent.

10.

That the case of *Mills & Gibb* referred to above and in the opinions deciding the case of your petitioner, was duly before the said United States Court of Customs Appeals at the same time your petitioner's case was before said Court and was decided concurrently therewith, and your

petitioner presents herewith as Schedule "B" of this petition correct copies of the prevailing and dissenting opinions of the said United States Court of Customs Appeals in the said *Mills & Gibb* case.

11.

That as the petitioner is informed and believes, the United States Court of Customs Appeals as well as the United States Board of General Appraisers, under the facts hereinbefore set out, were both possessed of jurisdiction to hear and determine the case of your petitioner above described and to pass upon the merits thereof and that it was within the jurisdiction of the said Court in said cause to review and to pass upon the action and refusal to act of the Secretary of the Treasury of the United States under the provisions of paragraph I of Section 3 of the Tariff Act of 1913, as to all of which the said Court held it was without jurisdiction.

Wherefore, your petitioners say that there being no provision of law providing for an appeal or writ of error or certiorari to your Honorable Court in such cases they are remediless in the premises by reason of the failure of said Board and said Court on appeal therefrom to take jurisdiction of such case according to the purpose and intent of the statute unless leave be granted to file this petition for Mandamus as aforesaid by your Honorable Court to test the question whether your petitioners can be thus deprived of their statutory right to a judicial review of said collector's decision based upon said erroneous construction of the law by the Treasury Department and the solemn judicial action of the appellate appraising tribunal be set as naught by the executive officials without any review thereof by the courts; and to command said court to take jurisdiction of said case upon the merits and to determine the issues of law tendered therein, namely——

As to whether as matter of law under the facts and circumstances of this case the importer must have his exact invoice value sustained in order to procure the benefits of said paragraph I in advancing above market value to avoid penalties, although the importer had sustained his contention that the appraised value was excessive as determined after judicial hearing by the appellate appraising Board.

Or whether he was bound to pay excessive duties upon the advance (that is, upon a valuation of his goods at more than they have been judicially determined to be worth).

In other words, that the Congress intended that the importer should accurately state to an infinitesimal fraction the exact market value of his goods and should accurately guess to a hair the exact figure which the appellate appraising Board should determine to be the dutiable value of his goods in order to receive the benefit of the beneficent provisions of paragraph I upon an importation of the same goods following a test case. That he must predict at his peril the exact result of the judicial determination or pay excessive duties—the very thing which the new provision of paragraph I was designed to prevent.

This issue of law thus legally tendered, the Court of Customs Appeals declined to consider in holding that the fiat of an executive official in setting aside the results of the appraisement trials and the decision of the Collector of Customs made in obedience to his orders was conclusive whether right or wrong and not subject to judicial review.

For the purpose of compelling a decision upon said issue of law this proceeding for Mandamus is instituted.

This action amounting, in the view of your petitioners, to such an abuse of jurisdiction as calls for the exercise of the strong arm of this court to compel a judicial review by the United States Court of Customs Appeals of the said collector's decision predicated upon the non-action of the Secretary of the Treasury in failing to perform the ministerial duty of directing a reliquidation at the appraised

value, relief from which error of law your petitioners would otherwise be remediless.

Your petitioners therefore pray

1. That leave may be granted to file this petition asking for said Writ of Mandamus as aforesaid.

2. That a citation and order be issued to ROBERT M. MONTGOMERY, *Presiding Judge*, JAMES F. SMITH, ORION M. BARBER, MARION DE VRIES, and GEORGE E. MARTIN, *Associate Judges*, of the United States Court of Customs Appeals, commanding them upon a day certain in the usual course of the court in such cases to appear and answer the premises and show cause if any they have why the Writ of Mandamus should not issue against them requiring them to take jurisdiction of said case and consider the same upon the merits and to determine and review the question of law involved therein as to the legality of the collector's decision in this case based upon the failure of the Secretary of the Treasury to perform his ministerial duty of directing reliquidation at the appraised value.

PARK & TILFORD,
Petitioner.

By HATCH & CLUTE,
Attorneys for Petitioner,
100 Broadway,
New York, N. Y.

EDWARD S. HATCH,
VINCENT P. DONIHEE,
of Counsel for Petitioner.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

James W. Buckner being duly sworn, says that he is the Second Vice-President of Park & Tilford, the corporation described in and which is the petitioner in the foregoing petition; that he has read the foregoing petition and knows the contents thereof; that the said petition is true to the knowledge of deponent, except as to the matters and things therein stated to be alleged on information and belief, and that as to those matters he believes it to be true; that the reason why this verification is made by deponent is that the petitioner is a corporation, as set forth in said petition, and your petitioner is one of its officers as aforesaid.

Sworn to before me this 31st day of May, 1917. } ss.:

James W. Buckner

Harry A. Kinsley,
Notary Public, No. 77
New York County

Notorial Seal

BRIEF IN SUPPORT OF PETITION FOR MANDAMUS.

Park & Tilford, plaintiffs herein, a corporation organized under the laws of the State of New York and having its principal office and place of business in the City and State of New York, respectfully asks your Honorable Court for leave to file this their petition for the Writ of Mandamus against the Honorable the Judges of the Court of Customs Appeals, defendants herein, sitting in the City of Washington, District of Columbia, to compel said court to take jurisdiction and to pass upon the merits of a suit before said Court entitled Park & Tilford v. The United States, No. 1715, wherein said court refused to review the action of the administrative officials of the Treasury Department in declining to give a certain direction required by law for the remission of certain excessive customs duties under an erroneous and arbitrary construction by the said executive officials of the customs administrative law as repealed and re-enacted by the act of October 3, 1913, and wherein said court refused jurisdiction of the controversy and declined to consider the issue of law tendered therein by affirming the action of the Classification Board III of the Board of United States General Appraisers in dismissing and overruling for lack of power and jurisdiction the complaint and protest of your petitioners.

The Court of Customs Appeals has held in effect that there is no judicial review of the decision of the Collector of Customs because the said collector's action was based upon the failure of the Secretary of the Treasury to perform certain preliminary duty imposed upon him under paragraph I of Section III of the act of October 3, 1913, and they held that such administrative action and failure to act is not subject to judicial review, in spite of the express provision for judicial review of every decision of the

collector as to the rate and amount of duties (paragraph N, Section III, act of 1913).

Once before, the courts held that certain language of an act of Congress prevented judicial review of administrative action in determining the correct amount of duty in customs matters, *Cary* v. *Curtis* (3 How., 235), and construed an appeal given by that act to the Secretary of the Treasury to be conclusive and not subject to judicial review by the courts.

But as the Supreme Court later said in *DeLima* v. *Bidwell* (182 U. S., 1, on page 178), in speaking of the case of *Elliot* v. *Swartout* (10 Peters, 137), which without statutory authority sustained the original suit against the collector at common law——

> "This decision was made in 1836. Apparently in consequence of it an act was passed in 1839 requiring moneys collected for duties to be deposited to the credit of the Treasurer of the United States; and it was made the duty of the Secretary of the Treasury to draw his warrant upon the Treasurer in case he found more money had been paid to the collector than the law required. It was held by a majority of this court in *Cary* v. *Curtis*, 3 How., 236, that this act precluded an action of assumpsit for money had and received against the collector for duties received by him, and that the act of 1839 furnished the sole remedy. It was said of that case in *Arnson* v. *Murphy* (109 U. S., 238, 240):
>
> > 'Congress, being in session at the time that the decision was announced, passed the explanatory act of February 26, 1845, which, by legislative construction of the act of 1839, restored to the claimant his right of action against the collector, but required the protest to be made in writing at the time of payment of the duties alleged to have been illegally exacted, and took from the Secretary of the Treasury the authority to refund conferred by the act of 1839.'"

And after deciding that the remedy given by the customs statutes and later by the customs administrative act was exclusive (*Schoenfeld* v. *Hendricks*, 152 U. S., 691), nevertheless sustained the common law remedy against the collector in that case because the goods were not technically imported merchandise, stating (page 180)——

> "We are all of opinion that this action was properly brought"——

which is significant in view of their division on other matters. They had said on page 176——

> "Where there is an admitted wrong the courts will look far to supply an adequate remedy."

Paragraph N of Section III, act of October 3, 1913, reads as follows:

> "That the decision of the collector as to the rate and amount of duties chargeable upon imported merchandise, or upon merchandise on which duty shall have been assessed, including all dutiable costs and charges, and as to all fees and exactions of whatever character (except duties on tonnage) shall be final and conclusive against all persons interested therein, unless the owner, importer, consignee, or agent of such merchandise, or the person paying such fees, charges, and exactions other than duties, shall, within thirty days after but not before such ascertainment and liquidation of duties, as well in cases of merchandise entered in bond as for consumption, or within fifteen days after the payment of such fees, charges, and exactions, if dissatisfied with such decision imposing a higher rate of duty, or a greater charge, fee or exaction, than he shall claim to be legally payable, file a protest or protests in writing with the collector, setting forth therein distinctly and specifically, and in respect to each entry or payment, the reasons for his objections thereto, and if the merchandise is entered for consumption shall pay the full amount of the duties and charges ascertained to be due thereon.
>
> * * * * * *

> Upon such payment of duties, protest, and deposit of protest fee, the collector shall transmit the invoice and all the papers and exhibits connected therewith to the board of nine general appraisers, for due assignment and determination as provided by law; such determination shall be final and conclusive upon all persons interested therein, and the record shall be transmitted to the proper collector or person acting as such, who shall liquidate the entry accordingly, except in cases where an appeal shall be filed in the United States Court of Customs Appeals within the time and in the manner provided for by law."

This gives to the importer by protest and appeal to the Board of General Appraisers a judicial review of the action of the collector in assessing the rate and amount of duties, and the act of 1909 gives him a further right to procure a review of said decision as to the errors of law and fact contained therein before the Court of Customs Appeals.

And although the importer was confessedly compelled to pay duties upon a larger valuation than that found to be correct after judicial trial by the appellate appraising officers, the Court of Customs Appeals denied it a judicial review of the decision of the administrative officials thus given it by the law, and by their decision refused to take jurisdiction of the controversy.

From this refusal by the Court of Customs Appeals no writ of error or certiorari or appeal lies to this Court (Section 29 of the act of August 5, 1909).

This petition (the only remedy remaning) is now brought to compel said court to take jurisdiction of the controversy and to determine whether the correct amount of duty has been levied upon the goods in controversy by said decision of the collector and to either affirm the collector's finding or to grant relief according to the claim of your petitioner.

The decision in *Cary* v. *Curtis* (3 How., 235), as well as the decision of the Court of Customs Appeals in the case at bar, holding the citizen had no judicial remedy to determine the legality of the exaction by compulsion of duties claimed to be excessive and that Congress had intended to leave him at the mercy of the executive officials is best characterized by the trenchant language of Judge STORY in protest. (See his dissenting opinion, 3 How., page 252.)

This was delivered in January, 1845, and on February 26, 1845, the Congress declared that he had correctly interpreted the Congressional intent by passing the act of February 26, 1845.

Judge STORY said:

> "I know of no power, indeed, of which a free people ought to be more jealous, than of that of levying taxes and duties; and yet if it is to rest with a mere executive functionary of the government absolutely and finally to decide what taxes and duties are leviable under a particular act, without any power of appeal to any judicial tribunal, it seems to me that we have no security whatsoever for the rights of the citizens. And if Congress possess a constitutional authority to vest such summary and final power of interpretation in an executive functionary, I know no other subject within the reach of legislation which may not be exclusively confided in the same way to an executive functionary; nay, to the executive himself."
>
> * * * What ground is there to suppose that Congress could intend to take away so important and valuable a remedy, and leave our citizens utterly without any adequate protection? It is said, that circuitously another remedy may be found. The answer is, that if Congress have taken away the direct remedy, the circuitous remedy must be equally barred. But in point of fact no other judicial remedy does exist or can be applied. If the collector is not responsible to pay back the money, nobody is.

The government itself is not suable at all; and certainly there is no pretence to say that the Secretary of the Treasury is suable therefor. Where then is the remedy which is supposed to exist? It is an appeal to the Secretary of the Treasury for a return of the money, if in his opinion it ought to be returned, and not otherwise. No court, no jury, nay, not even the ordinary rules of evidence, are to pass between that officer and the injured claimant, to try his rights or to secure him adequate redress. Assuming that the Secretary of the Treasury will always be disposed to do what he deems to be right in the exercise of his discretion, and that he possesses all the qualifications requisite to perform this duty, among the other complicated duties of his office—a presumption which I am in no manner disposed to question—still it removes not a single objection. It is, after all, a substitution of executive authority and discretion for judicial remedies. Nor should it be disguised, that upon so complicated a subject as the nature and character of articles made subject to duties, grave controversies must always exist (as they have always hitherto existed) as to the category within which particular fabrics and articles are to be classed. The line of discrimination between fabrics and articles approaching near to each other in quality, or component materials, or commercial denominations, is often very nice and difficult, and sometimes exceedingly obscure. It is the very case, therefore, which is fit for judicial inquiry and decision, and falls within the reach of that branch of the judicial power given by the Constitution, where it is declared 'that the judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties, &c.' If then the judicial power is to extend to all cases arising under the laws of the United States, upon what ground are we to say that cases of this sort, which are eminently 'cases arising under laws,' and of a judicial nature, are to be excluded from judicial cognizance, and lodged with an executive functionary?

Besides, we all know that, in all revenue cases, it is the constant practice of the Secretary of the Treasury to give written instructions to the various collectors of the customs as to what duties are to be collected under particular revenue laws, and what, in his judgment, is the proper interpretation of those laws. I will venture to assert that, in nineteen cases out of twenty of doubtful interpretation of any such laws, the collector never acts without the express instructions of the Secretary of the Treasury. So that in most, if not in all cases where a controversy arises, the Secretary of the Treasury has already pronounced his own judgment. Of what use then, practically speaking, is the appeal to him, since he has already given his decision? Further, it is well known, and the annals of this court as well as those of the other courts of the United States establish in the fullest manner, that the interpretations so given by the Secretary of the Treasury have, in many instances, differed widely from those of the courts. The Constitution looks to the courts as the final interpreters of the laws. Yet the opinion maintained by my brethren does, in effect, vest such interpretation exclusively in that officer.

These considerations have led me to the conclusion that it never could be the intention of Congress to pass any statutes, by which the courts of the United States, as well as the state courts, should be excluded from all judicial power in the interpretation of the revenue laws, and that it should be exclusively confided in an executive functionary finally to interpret and execute them—a power which must press severely upon the citizens, however discreetly exercised, and which deeply involves their constitutional rights, privileges, and liberties. The same considerations force me, in all cases of doubtful or ambiguous language admitting of different interpretations, to cling to that which should least trench upon those rights, privileges, and liberties, and a' fortiori to adopt that which would be in general harmony with our whole system of government.

> And this leads me to say that, after the most careful examination of the 2d section of the act of 1839, ch. 82, I have not been able to find any ground to presume that Congress ever contemplated anything contained in that section to be a bar to the present action. I look upon that section as framed for a very different object, an object founded in sound policy and to secure the public interest."

The particular way in which judicial review of administrative action is here denied arises even in perhaps a more aggravated form than in *Cary* v. *Curtis* in that, the administrative fiat here sets aside the result of the appellate appraisement proceedings now, for the first time, by the act of 1913, surrounded by all the sanctions and safeguards of a judicial hearing and "not subject to review in any manner for any cause in any tribunal or court." (See Subsection 13, of section 28, act of 1909.)

Coincident with converting appraisements upon appeal into judicial form, with full publicity, right of cross-examination, etc., the Congress adopted a plan in the act of 1913, to prevent duplication of such appraisement trials and to relieve an importer bringing in a series of importations of a staple product from being penalized in any but the initial shipment which made the test case, and if successful, to receive the benefit of the test case upon all his following shipments where the market had remained uniform.

Formerly he was compelled to try out each case separately and contest the appraiser's finding at the peril and risk of heavy penalties on every one of his shipments.

The italicized portion of paragraph I, section III, of the act of 1913, following, contains the provision added for this purpose, which we invoke in this case. Paragraph I now reads:

> "The duty shall not, however, be assessed in any case upon an amount less than the entered value, *unless by direction of the Secretary of the Treas-*

ury in cases in which the importer certifies at the time of entry that the entered value is higher than the foreign market value and that the goods are so entered in order to meet advances by the appraiser in similar cases then pending on appeal for reappraisement, and the importer's contention shall subsequently be sustained by a final decision on reappraisement, and it shall appear that the action of the importer on entry was taken in good faith, after due diligence and inquiry on his part, and the Secretary of the Treasury shall accompany his direction with a statement of his conclusions and his reasons therefor."

We appealed to reappraisement, made the test case, and by our evidence upon appeal procured a reduction therein. Similarly, with the same result after trials on the later shipments involved therein, we obtained the same reduction from the appraised value.

But in order to invoke the statute and conform to the advance in the test case so as to avoid possible penalties if unsuccessful we had to advance the later shipments upon entry. The Secretary, upon whom the ministerial duty of enforcing the judgment is imposed, refuses to do so upon the alleged legal ground that we should have obtained a reduction to the exact amount of the entered value in the test case and the invoice value in the subsequent cases in order to procure the benefit of the judgment resulting from the reappraisement trials; and, for this reason alone, refused to "direct" liquidation below the entered value. Whereupon the collector acting under the Secretary's direct instruction refused to grant any relief with the result that we pay duty upon a higher valuation than the value which our goods were determined to be worth by the appellate appraising tribunal for dutiable purposes.

In other words, that because we did not win a 15 per cent reduction down to our invoice and only obtained a 12½ per cent reduction, we must pay excessive duties upon the whole entered value, and this notwithstanding—

(1) Our certificate was in order. That is not denied.

(2) We made the advance in good faith above market value to meet the previous advance in our own test case. That is not denied.

(3) We prosecuted our appeal with due diligence and to such effect that after hearing our evidence the appellate appraising body held the local appraiser's finding was too high; incidentally and necessarily holding thereby that the issue was the same as in the test case which was followed. That is not denied.

Upon our protest and appeal first the Classification Board of General Appraisers, and secondly the Court of Customs Appeals refused to review the Secretary's fiat resulting in an unfavorable decision by the collector, upon the ground that, right or wrong, it is final and not subject to judicial review, and refused to consider the issue tendered and to decide whether the collector's decision thus induced was right or wrong.

We do not ask your Honorable Court to decide this issue nor to direct the Court of Customs Appeals to decide it in our favor; but we do ask that the court grant a rule upon the members of the Court of Customs Appeals to show cause why they should not decide whether the collector's decision (thus induced by the Secretary's failure to give the statutory direction) was right or wrong, and to interpret the Congressional purpose in placing this new provision in the act. And further to prevent them from declining jurisdiction upon the ground that the joint administrative action above described is not subject to judicial review.

Right to Judicial Review.

That the decision is that of the *collector and reviewable as such*, even if induced by the illegal ruling of the Secretary, is clear upon the authorities.

Upon a similar situation in the case of *United States* v. *Beebe* (122 Fed., 769) where the Secretary of the Treasury had been given a *discretion* to determine certain matters relating to currency reliquidations and where it was suggested that the collector's action could not be reviewed under a substantially identical section of the customs administrative law (Section 14 of the act of 1890) because it was preceded by action by the Secretary, Judge PUTNAM rendering the opinion for the Circuit Court of Appeals for the First Circuit, said:

> "The United States raise a question of the jurisdiction of the board of general appraisers. On that point we need add but very little to what was said in the circuit court. The act of June 10, 1890, c. 407 (26 Stat., 131) is the law which established this tribunal. The United States rest on the words 'decision of the collector' found in section 14, and they claim that in the case at bar the 'decision' was not that of the collector of Boston, but of the Secretary of the Treasury. This is a narrow construction of the expression, because the ultimate tribunal which reliquidated was not the Secretary, but the collector, so that at common law mandamus would lie only against the latter, and not against the former. This position, moreover, begs the question, because, if the action of the Secretary was unlawful, as we hold it was, the collector could rest nothing done by him on that action, and whatever he did was his own.
>
> The United States rely on *United States* v. *Klingenberg*, 153 U. S., 93, 14 Sup. Ct., 790, 38 L. Ed., 647. The opinion in that case is a very elaborate one, growing out of lack of compliance with the statutes on the part of the importer at the very origin of the transaction; that is when he took his invoice. Several things said in it may be regarded as dicta; but, however that may be, *United States* v. *Passavant*, 169 U. S., 16, 18 Sup. Ct., 219, 42 L. Ed., 644, must be held to broaden the view of the jurisdiction of the board of general appraisers when

there is involved a mere question of law such as arises at bar on the letter of instructions from the secretary to the collector.

A useful discussion of the general power of the courts to revise questions of law arising on the face of the proceedings by executive departments will be found in *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S., 84, 23 Sup. Ct., 33, 47 L. Ed., —. We also refer to *Hyatt* v. *Corkran*, 168 U. S., 691, 23 Sup. Ct., 456., 47 L. Ed., —."

Again in overruling the same contention and in taking jurisdiction by protest and appeal under language substantially the same as paragraph N, Section II of the act of 1913, the Circuit Court of Appeals of the Fourth Circuit in *Stone* v. *Whitridge* (129 Fed., 33, at page 36), says:

"The appellant contends that the action submitted to the Board of General Appraisers was not that of the collector of customs at Baltimore, but was a decision of the Secretary of the Treasury, made in the discharge of the duties imposed upon him by law, and that the Board of General Appraisers has no authority in law to review him. It is insisted on the part of the appellant that Congress could not have intended to submit the decision of the Secretary of the Treasury upon matters in which the statute imposes upon him the responsibility of deciding, to review, and possibly reversal, by subordinate divisions of his own department. We cannot agree that in exercising the powers of review vested in the Board of General Appraisers by law the board is a subordinate division of the Treasury Department. On the other hand, the members of the Board of General Appraisers are appointed by the President, by and with the advice and consent of the Senate, and acting within its jurisdiction, the board is an independent tribunal empowered by law to pass upon certain controversies between the government and the importer, and in this respect the board is no more subordinate to the Treasury Department than is any other court."

In conclusion, on page 39 the Court cites with approval the above quoted language of Judge PUTNAM in *United States* v. *Beebe*.

The *Stone* v. *Whitridge* case was reversed on appeal *upon the merits*, in favor of the secretary's ruling. *U. S.* v. *Whitridge* (197 U. S., 135). Consequently, it became unnecessary for the Supreme Court to pass upon the question of power and jurisdiction and they therefore expressly declined to do so, stating at bottom of page 144:

> It does not matter to our decision whether we say that in such circumstances the action of the Secretary was conclusive or say that it was right—

which leaves the above quoted opinions by the Circuit Court of Appeals in the 1st and 4th Circuits as the last expression of judicial authority upon the issue of jurisdiction here involved previous to the recent opinion of the Court of Customs Appeals.

Mandamus the Proper Remedy.

The Court of Customs Appeals affirmed Board III in overruling the protest on the ground that it was outside the jurisdiction of the board. In effect, a dismissal without entering judgment on the merits.

We ask for mandamus upon the authority of *In re Hohorst*, 150 U. S., 653, where mandamus was issued to compel a lower court to take jurisdiction which they had refused, the same not being reviewable on appeal at that stage of the case, and upon the principle stated by Mr. Justice GRAY in *Grossmayer, Petitioner*, 177 U. S., 48, where he said on page 49:

> "But, if the court, after sufficient service on the defendant, erroneously declines to take jurisdiction of the case or to enter judgment therein, a writ of mandamus lies to compel it to proceed to a determination of the case, except where the authority to issue a writ of mandamus has been taken away by statute."

And as further stated by Chief Justice FULLER, in *In re Pollitz, petitioner,* 206 U. S., 323, on page 331:

> "Where the court refuses to take jurisdiction of a case and proceed to judgment therein, *when it is its duty to do so and there is no other remedy,* mandamus will lie unless the authority to issue it has been taken away by statute."

This being the only remedy open, as this case does not come under the act allowing certiorari in certain cases from the decisions of the Court of Customs Appeals.

Here we are dealing with refusal to enter judgment on the merits because some other body (here the Secretary of the Treasury), an administrative officer, had exclusive jurisdiction of the controversy without court review thereof.

If, as we think, that conclusion is erroneous and Congress intended by the administrative act to give a judicial review of all *"customs cases," i. e.,* classification cases (*De Lima* v. *Bidwell,* 182 U. S., at bottom of page 178), the remedy given through the Board of General Appraisers being exclusive (*Schoenfeld* v. *Hendricks,* 152 U. S., 691), we are without remedy unless the writ issues.

All of which is respectfully submitted.

HATCH & CLUTE,
Attorneys for Petitioner.

EDWARD S. HATCH,
VINCENT P. DONIHEE,
of Counsel for Petitioner.

EXHIBITS.

"Schedule A."

(Record of Petitioner's Case Before United States Court of Customs Appeals.)

1715

UNITED STATES COURT

of

CUSTOMS APPEALS

No. 1715

PARK & TILFORD, Appellants,

vs.

THE UNITED STATES, Appellee.

TRANSCRIPT OF RECORD

On Appeal From the Board of United States General Appraisers.

Filed June 17, 1916, United States Court of Customs Appeals.—Arthur B. Shelton, Clerk.

HATCH & CLUTE,
Attorneys for Appellants,

BERT HANSON,
Assistant Attorney-General
Attorney for Appellee.

PRINTED UNDER THE DIRECTION OF THE CLERK.

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UNITED STATES COURT OF CUSTOMS APPEALS.

PARK & TILFORD, *Appellants,*

vs.

THE UNITED STATES, *Appellee.*

No. 1715

PETITION.

To the United States Court of Customs Appeals:

Your Petitioner, having complied with the Statutes in such case made and provided, is dissatisfied with the decisions of the Board of United States General Appraisers, in the matters referred to in the Schedule below, as to the construction of the law and the facts respecting the classification of such merchandise, and the rate of duty imposed thereon under such classification.

The following is a concise statement of Errors of Law and Fact complained of:

ERRORS OF FACT.

1. The Board of United States General Appraisers erred in not finding that the importer's contention was sustained.

ERRORS OF LAW.

2. The said Board erred in holding it had no jurisdiction in this case.

3. The said Board erred in not holding that the question involved herein had to do with the rate or amount of duties chargeable upon imported merchandise.

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4. The said Board erred in not holding that the question involved herein was an exaction not warranted by law.

5. The said Board erred in not holding the Importers' contention was sustained by a final decision on reappraisement within the meaning of Section III, paragraph "I" in the last sentence of the last proviso thereof. Act of Oct. 3, 1913.

6. The said Board erred in not holding that the Secretary of the Treasury misconstrued the said paragraph and sentence as to his powers thereunder.

7. The said Board erred in not holding that the Secretary of the Treasury had power to give relief under said law to the Importer on the facts shown in this case.

8. The said Board erred in holding that the power to grant relief under said law is vested solely in the Secretary of the Treasury personally.

9. The said Board erred in not holding that the power to give relief under said law is granted in the first instance to the Secretary of the Treasury, and that in the absence of action upon his part, if it is made to appear that the Importer is entitled to relief under said law, that then relief may be had by protest and appeal upon proof of the necessary facts.

10. The said Board erred in not holding that under said law the Importers' contention is sustained by a final reappraisement, when by such final decision it appears that the foreign market value of the goods is less than the entered value and that under such circumstances, according to law, the Secretary of the Treasury has power to direct assessment upon the amount less than the entered value.

11. The said Board erred in not holding that the Secretary of the Treasury has power under said law, on the facts disclosed in this case, to grant relief and that the Board has jurisdiction to construe said law and to define the powers of the Secretary of the Treasury thereunder.

12. The said Board erred in not sustaining the protest of the Importer and the same is relied upon as fully as if here again set forth at large.

The following is a description of the importations made by your petitioner which are the subject matter of said decisions, and of this petition, namely:

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SCHEDULE.

Description of Merchandise	Vessel	Date of Entry	Number of Protest	Date of Decision
Perfumery, etc.	Chicago	July 2, '15	801869/5590	May 8, '16
	Chicago	July 31, "	"	
	Espagne	Aug. 2, "	"	
	La Touraine	July 20, "	"	
	La Touraine	Aug. 18, "	"	
	Netherlee	Aug. 6, "	"	

Wherefore, your petitioner prays that this Court review the questions of law and fact involved in said decisions concerning the classification and rates of duty assessed upon the said merchandise, and that an order may be entered requiring the said Board to return to this Court the record and evidence taken by them, together with a certified statement of facts involved in the case, and their decisions thereon; and your petitioner prays for such other or further relief as to the Court may seem just.

PARK & TILFORD,
Petitioners.

By HATCH & CLUTE, *Attorneys for Petitioner,*
No. 100 Broadway, New York City.

BOND of Frederic W. Acton, in the sum of fifty dollars, approved by R. M. Montgomery, United States Judge. Filed May 9, 1916.

ENDORSED: United States Court of Customs Appeals. Filed May 9, 1916. Arthur B. Shelton, Clerk.

MANDATE issued May 9, 1916. Arthur B. Shelton, Clerk.

RETURN OF THE BOARD.

Board of United States General Appraisers. No. 1715.

Park & Tilford, *Appellants,*

v.

The United States, *Appellee.*

The petitioner above named, having applied to the United States Court of Customs Appeals for a review of

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the questions of law and fact involved in a decision of the Board of United States General Appraisers in the above case, and the said Court having ordered the Board to transmit to said Court the record, evidence, exhibits, and samples, together with a certified statement of the facts involved in the case and its decision thereon:

Now, therefore, pursuant to said order, the Board of United States General Appraisers does hereby transmit to said Court the record, evidence, exhibits, and samples in said case, together with a certified statement of the facts involved in the case, and also its decision thereon.

This return specifically comprises the following:

1. Protest 801869/5590 with the report of the collector of customs thereon;

2. A copy of Department letter of March 2, 1916, referred to in the collector's report;

3. A transcript of the testimony taken before the board;

4. Exhibits 1 to 5, referred to in the testimony;

5. A copy of the board's decision in question, Abstract 39704.

Witness the Honorable Jerry B. Sullivan, President of the Board, this twentieth day of May, A. D. 1916.

D. P. DUTCHER,
Chief Clerk.

Legality of liquidation.

PROTEST 801869/5590.

New York, February 26, 1916.

To the Honorable Collector of Customs,
Port of New York.

You will please take notice, that we protest against your decision as to the rate and amount of duties to be paid on various merchandise marked and numbered as per entries and invoices imported as per annexed schedule:

Entry No.	Vessel	Date of entry	Liquidation
25018	La Touraine	Aug. 18, 1915	Jan. 28, 1916
10745	" "	July 21, 1915	Jan. 29, 1916
	Original Page 5		
16819	Espagne	Aug. 2, 1915	Jan. 29, 1916
18179	Netherlee	Aug. 5, 1915	Jan. 31, 1916
15422—B. 28008	Chicago	July 31, 1915	Feb. 3, 1916
1250	"	July 2, 1915	Feb. 4, 1916

and claim as reasons for our objections thereto that the said merchandise is properly classifiable, in the alternative, under the following paragraphs of the Tariff Act of October 3, 1913:—

As assessed, but we claim that duty should be computed upon the value of the goods as ascertained by final decision on reappraisement.

We claim the Secretary of the Treasury errs in holding that he has no power, as matter of law, under Section III, paragraph I of the said Act, to direct that duty be assessed upon an amount less than the entered value unless the invoice value is sustained by final decision on reappraisement.

We claim under the law it is enough to confer such power on the Secretary if the importer's contention is sustained by a final decision on reappraisement that the "entered value is higher than the foreign market value."

We pay the amount exacted under compulsion, solely to get the goods, reserving all rights.

PARK & TILFORD,
By A. CRAIG, Jr.

AMERMAN & PATTERSON,
21 State St., New York City.

REPORT OF THE COLLECTOR.

April 4, 1916.

Respectfully referred to the Board of U. S. General Appraisers for decision.

At time of entry the importer, in each case, made an addition to the invoice value to make market value, stating the additions were made to meet advances in similar cases then pending upon appeal for reappraisement. Entry 18179 was subject to reappraisement by a general appraiser and the other entries were all subject to reap-

praisement by a Board of three General Appraisers under the provisions of Par. M of Sec. III. In each case, as the final reappraised value was less than the entered value but not as low as the invoice value this office assessed duty upon the entered value under the provisions of Par. I of Sec. III. No application was made through this

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office for reduction of the entered value in the form prescribed in T. D. 34806. Note T. D. 34179, 35629, 36221 and copy of Department letter of March 2, 1916 (101237) addressed to Hatch & Clute as to its practice in such cases.

The protest was lodged and fee paid within statutory time.

DUDLEY FIELD MALONE,
Collector.

Received: Custom House, New York, Feb. 26, 1916.

COPIES OF DEPARTMENT LETTERS.

Treasury Department,

Washington, March 2, 1916.

The Collector of Customs,
New York, N. Y.

Sir:—There is enclosed herewith for your information, a copy of a letter this day addressed to Messrs. Hatch & Clute, in the matter of the Department's practice with reference to applications for reductions of the entered value, under the provisions of paragraph I, of section III of the tariff act, in cases where the final reappraised value of merchandise is below the entered value, but above the value contended for by the importers.

Respectfully,

JAMES W. BEVANS,
Assistant Chief, Division of Customs.

Messrs. Hatch & Clute,
100 Broadway, New York, N. Y.

Gentlemen:

The Department acknowledges the receipt of your letter of the 24th ultimo, transmitting a petition by Messrs. Park & Tilford, for reduction of the entered value of a number of entries enumerated therein, on which advances have been made by the importers under the provisions of paragraph I, of section III of the tariff act.

You state that you have been advised by the customs officials of New York, that the Department has uniformly denied similar applications on the ground that as a matter of law, the Secretary of the Treasury has no power, under the paragraph cited, to direct the reliquidation of entries

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where the final reappraised values are less than the entered values, but not as low as the invoice, for the reason that in such cases the importer's contention is not sustained.

You are advised that in all cases where the importer has failed to make a specific contention as to market value, the Department regards the contention as being for the invoice value; and where the final reappraised value is below the entered value but not as low as the value contended for by the importer, it is the practice of the Department to decline to authorize a reduction of the entered value, on the ground that the importer's contention has not been sustained. This practice is based upon the Department's knowledge of the purpose and intent of the law, and is of such long standing that it will not make any change therein.

You are advised therefore, that if the entries enumerated in your petition come within the class mentioned

above, the Department's final action with reference thereto, would necessarily be in accordance with its practice outlined above.

Respectfully,

P. M. HALSTEAD,
Chief, Division of Customs.

STIPULATION.

United States Court of Customs Appeals. No. 1715.

Park & Tilford,

vs.

United States.

It is hereby stipulated and agreed by and between the attorneys for the above-named parties, that the copies of bills and extracts from the books of account forming a part of Exhibit 1, protest 801869, which are a part of the record in this case need not be printed on account of the difficulties in reproducing the same in print, but that they may be referred to on the argument and in the briefs as fully as if printed in the record, and that only the first four sheets of said Exhibit 1 need be printed, the same being the affidavits of Robert Bienaime and William Clark.

HATCH & CLUTE,
Attorneys for the Appellants.

THOS. J. DOHERTY,
For Assistant Attorney General, Attorney for the United States, Appellee.

Approved:
JAMES SMITH, *Associate Judge.*

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TESTIMONY.

The U. S. General Appraisers.
In the Matter of Protest 801869,
of Park & Tilford. Board 3.

Present:
GENERAL APPRAISER HAY.

Appearances:
Hatch & Clute (by Walter F. Welch),
for the Importers;

Samuel Isenchmid,
for the United States.

New York, April 19, 1916.

Mr. Welch: I believe the question in this case is somewhat novel. I haven't any knowledge that the question in the precise form in which we propose to present it has been raised. In this case the importers' goods were advanced on entry and pending final determination of the advance on that entry subsequent importations were made and the usual increase on entry was endorsed on the entry papers by the importers claiming it was done under duress to await the outcome in the Board case. The invoices had allowed a discount of 15 per cent which the examiner or appraiser reduced to 6, and on the final outcome of the matter the full Board on reappraisement allowed 6, 2 and 5, which is equivalent, as I figure it, to 12½ per cent.

Gen. Appr. Hay: Have you stated the amount he entered at?

Mr. Welch: It is purely a question of discount.

Gen. Appr. Hay: What discount did he enter at?

Mr. Welch: He entered at 15.

Gen. Appr. Hay: And what was it invoiced at?

Mr. Welch: You mean the entries after the first one, what were they?

Gen. Appr. Hay: Yes.

Mr. Welch: You mean the entries after the first one, what were they?

Gen. Appr. Hay: Yes.

Mr. Welch: He entered them at 6, the amount the appraiser allowed.

Gen. Appr. Hay: It was invoiced at 15, the appraiser made it 6—?

Mr. Welch: Yes, sir.

Gen. Appr. Hay: And the final reappraisement was—what?

Mr. Welch: Six, 2 and 5.

Gen. Appr. Hay: Which you say is equivalent to—?

Mr. Welch: Twelve and a half per cent.

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Gen. Appr. Hay: In other words, the importer contends it is 15, and that he entered it, we will not say under duress but under the statute, paragraph I, filed his certificate, I suppose?

Mr. Welch: Yes.

Gen. Appr. Hay: That he did it to comply with previous rulings of the Department or somebody else, and then he took a reappraisement?

Mr. Welch: Yes, but we do not admit that the importer contended it should be 15. All we admit is that he contended that entered value was higher than the market value. Now, a petition was addressed to the Secretary of the Treasury asking him to order a reliquidation of these entries in conformity with the final decision of the full Board, and, as we construe his action, he refused to do so for want of power because under the law as he construes it he has no power to do so, his construction of the law in question being that the words contained therein

"that the importers' contention shall be sustained" means—

Gen. Appr. Hay: I understand exactly. We have had that same question.

Mr. Welch: Not on the ground I want to—not on the ground of want of power.

Gen. Appr. Hay: We haven't had it complicated. The Mills & Gibb case presented that, but that presents also the question as to whether or not the collector could reliquidate at all except by the direction of the Secretary of the Treasury.

Mr. Welch: My point in this case is that the Secretary of the Treasury refused to act for want of power.

Gen. Appr. Hay: I understand your point exactly.

Mr. Welch: That this Board has the power to declare what the law is; that if he is wrong in his construction of the law the Board can set him right.

Gen. Appr. Hay: In other words, your contention is, "his contention should be sustained" is as much complied with when it is sustained in part as when it is sustained literally or actually?

Mr. Welch: Yes, because the law says if the entered value is higher than the value sustained on the final.

Gen. Appr. Hay: Your contention then would be that was his contention, not that 15 was correct?

Mr. Welch: Yes, and the Secretary says, I have not the power unless it is sustained in full.

CHARLES S. WELCH, called as a witness on behalf of the importers, having been duly sworn testified as follows:

By Mr. Welch: Now, Mr. Welch, what is your connec-

tion with Park & Tilford the importers in this case? A. Manager of the druggists' sundries department.

Q. Will you please look at the entries accompanying this protest and state whether or not you are familiar with the reappraisement proceedings which were covered thereby? A. I do not recall them by number.

Q. Have you had more than one reappraisement proceeding pending before the Board during the past year? A. No.

Q. Are you familiar with the proceedings Park & Tilford did have at that time? A. Yes, sir.

Q. They were under your particular charge, were they? A. Yes.

Q. Did you appear as a witness in this case? A. I appeared as a witness.

Q. Did you also take steps to procure the evidence that was produced at that hearing? A. Yes, I did.

Q. Now, do you recall being present at the hearing before the full Board of General Appraisers on the appeal when the final decision in these cases was reached? A. Yes, I was present.

Q. Do you recall whether or not there was any stenographer present and a record taken of that proceeding?

Mr. Isenschmid: Objected to as immaterial. The record speaks for itself.

Mr. Welch: I only asked him whether he recollects whether there was any present.

Gen. Appr. Hay: That is of course preliminary. Objection overruled, but I would like to know if there is any reason why there should be any dispute about the facts in the case.

Mr. Isenschmid: That is my point, why is it necessary to call a witness to show apparently what took place at the reappraisement.

Gen. Appr. Hay: It is necessary that the record should contain all the facts in some way if there is to be a decision in the case, but I was wondering why counsel could not agree on just what the facts are and put them in.

Mr. Isenschmid: Counsel hasn't consulted with the Government about agreeing.

Mr. Welch: I am willing to agree.

Gen. Appr. Hay: The facts were stated by Mr. Welch, were they not?

Mr. Isenschmid: As far as I know there appears to be nothing in the papers, no evidence, the papers don't show the statement he makes with reference to the Secretary's want of power.

Gen. Appr. Hay: How do you get that into the record, Mr. Welch?

Mr. Welch: I am going to offer in evidence later the petition to the Secretary and his replies thereto showing the position he took. They are not in the record.

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Mr. Isenschmid: I might state in this case only late yesterday afternoon the Assistant Attorney General's office was served with what purports to be a "notice to produce," which notice calls upon the Assistant Attorney General to produce at this hearing this morning (1) a petition to the Secretary of the Treasury dated New York, February 24, 1916, signed by Park & Tilford, petitioners, by Hatch & Clute, attorneys for the petitioners; (2) a letter dated February 24, 1916, addressed to the Secretary of the Treasury, Washington, D. C., signed by Hatch & Clute, enclosing the petition referred to under paragraph 1, of the notice; and (3) a letter dated March 6, 1916, addressed to the Secretary of Treasury, signed by Hatch & Clute, acknowledging letter of March 2 from the office of the Secretary of the Treasury, his file No. 101237. My answer to that notice to produce is that the Assistant Attorney General's office has not the papers, and never did have them. From the face of the notice they appear to be communications sent by Park & Tilford to the Secretary of the Treasury, and it would, technically speaking, seem to

be the Secretary would be the property party to whom the notice should be addressed. Furthermore, the answer of the collector to the protest in this case states that the application of Park & Tilford was not made through the collector's office as is usually done in cases of this kind. I think generally the application is made to the collector and he forwards it.

Gen. Appr. Hay: What does the law require? I am asking these questions because this does not seem to me to be a case in which there can be much testimony.

Mr. Welch: The law merely provides "except upon application to the Secretary of the Treasury."

Mr. Isenschmid: I don't think the application has to be made through the collector but I believe it is the custom. I am only stating this to explain why between yesterday afternoon and this morning we could not get the papers.

Judge Hay: No, the time is not adequate.

Mr. Welch: Only to allow me offering secondary evidence. I offered the notice merely as an excuse for not producing the original. I have only the carbon copy. I cannot offer secondary evidence without showing I asked my opponent to produce the originals.

Judge Hay: The theory upon which secondary evidence is admissible is that the opponent will not produce it.

Mr. Welch: Or is unable to.

Judge Hay: Or unable to, quite right, but he must have a reasonable time to do it in.

Mr. Isenschmid: My statement was only in the nature of an explanation of why the Government did not produce in compliance the papers asked for. I will further state that if Mr. Welch proves his secondary evidence in the proper way I shall have no objection to it.

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Gen. Appr. Hay: Let us then proceed with the facts. I have overruled your objection.

Q. (Read by stenographer) Do you recall whether or not there was any stenographer present and a record taken of that proceeding? A. I do not recall the presence of a stenographer at that hearing.

Q. And are you quite sure none was present? A. Yes.

Q. Had you taken steps to procure evidence from abroad to be used at that hearing?

Mr. Isenschmid: Objected to as absolutely immaterial, what steps he took to produce evidence.

Gen. Appr. Hay: That is also preliminary. But why not come to something, Mr. Welch. I don't know what it is you are getting at.

Mr. Welch: I am trying now to show diligence on their part. There is some question under the law whether the importer shows diligence.

Gen. Appr. Hay: I don't know. Simply shows evidence of good faith.

Mr. Welch: I shall show the good faith, that he did all in his power to procure all the necessary evidence to settle this question as evidence of his good faith.

Objection overruled.

A. I secured affidavits in Paris from the manufacturers themselves, from the manager as to what discounts they usually allowed in Paris; also secured affidavits from purchasers, from clients of the manufacturers, showing what discounts are allowed on purchases made by them and by Parquet & Javal, the manufacturers. To prove this evidence I took the original books of entry with the permission of Parquet & Javal to the American counsul and had those viséd, attested by the American consul, and had those attached to the affidavits, all of which I handed to you (counsel) to be presented as evidence.

Q. In that evidence you so produced was it uniform as to the rate of discount or did the discount vary?

Objected to as immaterial.

Objection sustained. Exception.

Q. Do you recall any statement made by counsel at that hearing as to the contention of the importer?

Objected to as incompetent.

Mr. Welch: I ask that question on this ground: I wish to show that the importer was not contending for the invoice value alone, but was only contending for the market value, whatever it might be, shown by the evidence produced either for or against the invoice. He voluntarily produced in evidence statements showing that the invoice value was too low, and that without regard as to whether the evidence was for or against the invoice. It was offered

to meet the allegation or assumption that the importer was contending for the invoice value.

Mr. Isenschmid: I would like to add this further word of objection to this line of testimony in an endeavor to show apparently what the importers claim was before the single general appraiser or the Board of General Appraisers, that this is immaterial because the statute itself provides in so many words what the importers' claim should be; in other words, it says that the Secretary may give relief only in such cases in which the importer certifies at the time of entry that the entered value is higher than the foreign market value, that the goods are so entered in order to meet advances by the appraiser in similar cases then pending on appeal for reappraisement.

Gen. Appr. Hay: Yes, suppose he does certify and the Board of General Appraisers reduces below the entered value, that is just the point. He claims the importer sustains his contention when it is reduced by the reappraisement below the entered value, but he announces in his certificate he entered at the higher value than he believes—

Mr. Isenschmid: He follows that method appointed by law.

Gen. Appr. Hay: Does he say in his certificate what the market value is?

Mr. Welch: No, we say the entered value is higher than the market value.

Mr. Isenschmid: Now I understand his contention before the single general appraiser and the Board was not for the invoice value but for something different than the entered value.

Judge Hay: May he not do that?

Mr. Isenschmid: It seems to me like a shifting of his position.

Gen. Appr. Hay: Either I don't understand the question or I don't understand you. You probably don't understand Mr. Welch's contention. He contends the claim of the importer not to be that the invoice value is correct but that the entered value is too high.

Mr. Welch: That is all.

Gen. Appr. Hay: That being so, and the general appraisers finding that the value is less than the entered value, then he has sustained his claim, and if the other conditions exist which authorizes the Secretary of the Treasury to direct a liquidation at a less value, he is entitled to a direction.

Mr. Welch: Yes, but the Secretary misconstrues the law. He says I haven't the power because the law means that you must sustain the invoice value, therefore I refuse to give the relief. I say, Mr. Secretary, you misconstrue the law. I want to raise that question.

Mr. Isenschmid: I see the point now. It might throw some light on the situation if I read from the letter signed by Mr. Halstead, chief of the customs division at Wash-

ington, which is with the papers. It is addressed to Messrs. Hatch & Clute, being a copy:

You are advised that in all cases where the importer has failed to make a specific contention as to market value the Department regards the contention as being for the invoice value; and where the final reappraised value is below the entered value but not as low as the value contended for by the importer, it is the practice of the Department to decline to authorize a reduction of the entered value, on the ground that the importer's contention has not been sustained.

Gen. Appr. Hay: Is not that what your contention is? The importer claimed something different, but having failed to make the thing specific that letter implies that your claim would be the invoice value?

Mr. Welch: Well, I say, you misconstrue the law.

Gen. Appr. Hay: The law does not imply any such thing?

Mr. Welch: Yes.

Objection overruled. Exception.

Q. (Read by stenographer) Do you recall any statement made by counsel at that hearing as to the contention of the importers? A. I remember Mr. Welch made the statement to the judge that his contention was not that the dutiable rate was 15 per cent, but his contention was the dutiable rate should be as the facts presented in the evidence would show.

Q. And did you then produce there and offer in evidence these various affidavits, etc., showing the various rates of discount given in wholesale transactions in France?

Mr. Isenschmid: Objected to as incompetent and immaterial. The record there certainly speaks for itself as to what was put in evidence.

Gen. Appr. Hay: Were they received in evidence?

Mr. Welch: They are not marked.

Gen. Appr. Hay: You were there?

Mr. Welch: Yes, they were handed in; there was no stenographer there.

Gen. Appr. Hay: Why don't you ask him then if they were received?

Q. Were the affidavits and evidence you have referred to offered and received? A. They were.

Q. Can you state what they tended to show?

Objected to as immaterial and incompetent.

Objection sustained. Exception.

By Mr. Isenschmid: How many reappraisements did Park & Tilford have during—you spoke of last year, do you mean during the year 1915? A. How many reappraisements?

Q. Yes. A. I am the witness in cases concerning goods for our department.

Q. Are you able to state that the papers which are be-

fore you do involve merchandise of the kind which you are interested in? A. These here papers (invoices and entries in the case), yes, sir.

Q. You were not able to state definitely that the reappraisement proceeding concerned the invoices and entries which were shown to you? A. Well, they are so numerous that I could not immediately identify each invoice as presented to me here.

Q. What was the merchandise involved? A. Perfumes and toilet articles.

Q. Did you have more than one reappraisement proceeding on this merchandise at that time? A. More than one reappraisement?

Q. Yes. A. Reappraisements on the different invoices that came in.

Q. Were they all at one hearing or different times? A. That I cannot answer.

Q. Did you come down to the Board here on more than one occasion on reappraisement? A. I came down to the Board twice.

Q. Was one judge sitting or more than one? A. The last I recall there were two judges sitting.

Q. That was the last time? A. Yes.

Q. Another time you recall there was one judge sitting? A. One judge.

Q. On which of those occasions did you see no stenographer present? A. At the last one.

Q. Were there two judges sitting? A. Two judges sitting.

Q. You are sure about that? A. Yes, I am sure about that.

Q. How about the time there was a single general appraiser, was there a stenographer then? A. There was a stenographer.

Q. How is it you are able to recall that? A. The reason I particularly recall it was we had to spend the whole morning waiting to be heard, and the trial was put off. We were the last to be heard, and there wasn't anybody else in or around the courtroom. As I remember, there was just in the courtroom Mr. Welch, counsel, and the judges.

Q. Two judges? A. Two judges.

Q. Can you state how near together these two reappraisements were held in point of time? A. Reasonably so. In about ten weeks.

Q. About ten weeks between them? A. About that.

Q. Now, those affidavits that you testified about getting from France and so on, when did you get them with reference to these two reappraisements you speak off? A. Referring to the first affidavits, we got these by correspondence. Simply asked the manufacturer to give us his affidavit showing what the usual wholesale discounts were, what usual wholesale discounts were given to purchasers in France.

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Q. When was this? Previous to this first reappraisement you described before the single general appraiser? A. The evidence that I secured that was presented before the single judge at the first hearing.

Q. All the evidence that you procured concerning which you testified this morning you got previous to the first hearing? A. No, I got the evidence that I testified about this morning, I secured that after that.

Q. And before the second reappraisement? A. Yes, before the second reappraisement.

Q. All the evidence then concerning which you testified or intended to testify this morning you got between the first hearing and the second hearing, did you? A. Yes.

Q. Do you have anything to do with the making of the entries for your firm? A. Making the entries, no; they are made by an entry clerk.

Q. You had no knowledge of this advance having been made by comparison between advances made on the former entries of yours? A. I had knowledge of the advance when it was made.

Q. Was that original advance the subject of a reappraisement also? A. I cannot answer that specifically, no.

Q. Can you tell us whether the hearing which you attended before the single general appraiser and which you attended before the Board where two judges were sitting, had to do with the same entries? A. Well, that I would not say because during the two hearings there were of course subsequent entries made which we entered under duress as well as the ones before that.

Q. Those were the only two hearings on this kind of merchandise that you can recall? A. Yes, sir.

Q. Is it not the presumption that the hearing before the Board was an appeal from the decision of the first reappraisement before the single general appraisers? Can you tell whether that is true? A. I presume so.

Mr. Welch: That is true. The record shows that.

Q. And you do not remember having another reappraisement proceeding on this kind of merchandise previous to these two hearings? A. Not in 1914.

Q. You are speaking of 1915 now? A. 1915, yes.

Q. In 1915? A. In 1915.

Q. Do you recall any on this merchandise in 1914? A. Not reappraisements. We had classification cases.

Q. The statement you testified to that Mr. Welch made as to what the importers' claim or contention was, where was that made, at which of these hearings? A. At the last hearing, before the Board.

Q. You did not hear him make any statement of that

kind before the single general appraiser at the first hearing? A. Not that I recall.

Q. Do you say he did not make any statement of that kind? A. That he did not?

Q. Yes. A. Not that I recall.

Q. You were there? A. Iwas there.

Q. If he had made it you would be able to recall that as you are able to recall his statement before the Board? A. Likely.

Mr. Welch: I have asked the clerk to produce the reappraisement papers and they are here.

By Mr. Welch: I withdraw from the envelope (containing the reappraisement records) these papers and ask you if you can identify them as the papers you testified were offered and received in evidence before the full Board? A. I recognize these papers as being the papers.

Mr. Welch: I offered those papers in evidence.

Mr. Isenschmid: I would like to have it appear in evidence whether that reappraisement proceeding covered the entries and invoices covered by the protest here in question, or whether it is the original reappraisement pur-

suant to which the advance was made and the certificate filed—whether it is the original reappraisement or the one which they advanced and filed certificate in.

Q. Referring to the entry which was the subject matter of this hearing before the full Board, was that the original entry upon which the first advance was made and upon which you raised the entered value in the subsequent cases? A. Yes.

By Mr. Isenschmid: It is not the reappraisement which covers the invoices and entries which are the subject of protest here this morning?

Judge Hay: What are you seeking to prove? The testimony that was before the Board in this proceeding which went to the Secretary with a request for an order to liquidate?

Mr. Welch: In the subsequent cases.

Judge Hay: Mr. Isenschmid understands you are offering the testimony that was before the Board of General Appraisers in the preceding hearing.

Mr. Isenschmid: Counsel informs me that is what it is.

Mr. Welch: If the Board please, in the original case there was no advance made on entry and the collector of course liquidated in accordance with the full Board's decision, in the original case.

Mr. Isenschmid: This is the importers' test case, the one pursuant to which he makes his advance.

Gen. Appr. Hay: No, sir, it is just the reverse; it is the

case the failure by the Secretary to direct the collector to liquidate the entry that brought about the protest in this case. It is the final, last decision of the Board of General Appraisers.

Mr. Isenschmid: Covering the invoices and entries that are the subject of protest here?

Mr. Welch: No, sir, in the original case. The other

cases never went to the full Board; in these other cases the single general appraiser followed the full Board's decision. That disposed of them. This is the case that was first imported, which the examiner advanced (referring to the reappraisement papers), and was appealed to the single general appraiser and decided, and then appealed to the full Board and decided; and of course in that case, being the first one, there was no addition on entry by the importer. He did later on other of his invoices.

Gen. Appr. Hay: Then I misunderstand you. I don't know what the purpose of your testimony is at all.

Mr. Welch: I want to show in these proceedings which resulted in fixing the discount at 6, 2 and 5, that we contended only that the invoice value—rather, that the entered value was higher than the invoice value.

Gen. Appr. Hay: What are these papers, these affidavits you are offering now? Were they in the case which brought about the entry at the advanced rate?

Mr. Welch: Yes, they are.

Gen. Appr. Hay: That is in the case, that fixed this 6, 2 and 5?

Mr. Welch: That is right, in the original case. In these cases that are on the table here the single general appraiser subsequently, as they came up before him, followed the full Board decision in the first case.

Mr. Isenschmid: He is evidently trying to prove good faith, etc., of a transaction which took place before he filed this certificate in the instant case. Anything he may have done in connection with the original case where the examiner or appraiser advanced it I do not see can be evidence in this case.

Mr. Welch: That is what the law says, unless the importer certifies that the entered value is higher than the foreign market value and the goods are so entered in order to meet advances in similar cases then pending on appeal. Here it is. These were raised under the law while that case was pending.

Gen. Appr. Hay: Did you never appeal to a reappraisement in this case which is here now?

Mr. Welch: No, it was not necessary, as our appeal was finally disposed of and the single general appraiser only followed the full Board decision.

Gen. Appr. Hay: The question is what was your contention in this case that was under the reappraisement that is called in question by this classification case? What was your claim in that?

Mr. Welch: It says, in similar cases then pending and

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the importer's contention shall subsequently be sustained by a final decision on reappraisement.

Gen. Appr. Hay: That was the importer's contention in the case that brought about his making an advance, but the contention in the case that the Secretary is asked to direct the collector in, what was his claim in that?

Mr. Welch: The only claim in that case is that endorsed on the entry, "The importer adds for value under duress to meet advances by the appraiser in similar cases now pending on appeal for reappraisement."

Mr. Isenschmid: On the admission of counsel that the invoices and entries included in the protest never went on appeal to the Board it would look as though they could not contend at all that the importer's contention was subsequently sustained by a final decision on reappraisement.

Mr. Welch: The single general appraiser's decision was final. There was no appeal from it.

The papers offered in evidence admitted and marked collectively Exhibit 1, 801869, April 19, 1916.

WALTER F. WELCH, called as a witness on behalf of the importers, having been duly sworn, testified as follows:

I am counsel for the importers in this case, and have had sole charge of the proceeding. In connection therewith I prepared a petition to the Secretary of the Treasury and a letter to accompany the same, addressed it to him, and in due course of mail I received his reply acknowledging the receipt of that letter and the petition enclosed. Therefore, I offer in evidence a copy of the petition which I know to be a copy of the original, and of the letter which accompanied the same, with leave to the government to substitute copies of the originals if they find any discrepancies.

Gen. Appr. Hay: Let them be received if there is no objection.

Mr. Isenschmid: In order to avoid comparing all the data in the petition here, I understand that this petition covers all the entries and invoices which are the subject of the protest under consideration this morning?

Mr. Welch: Yes.

No objection, the petition and letter attached are marked Exhibit 2 collectively.

Mr. Welch: I offer in evidence a letter from the office of the Secretary dated March 2, 1916, already referred to, acknowledging receipt of the petition and the letter sent with the petition.

Admitted and marked Exhibit 3.

Mr. Welch: I offer in evidence copy of a letter dated

March 6, 1916, addressed to the Secretary and signed by Hatch & Clute, in reply to the Secretary's letter of March 2, 1916, Exhibit 3.

Admitted and marked Exhibit 4, etc.

There is evidently some discrepancy here. I have a

letter here from the Secretary of the Treasury dated March 20, purporting to be an acknowledgment of our letter of the 16th, whereas the letter that went to the Secretary is dated March 6. I am unable to explain that at this moment. I did not notice it before taking the stand.

Gen. Appr. Hay: Probably an error.

Mr. Welch: Yes, but I will say I know that no other letter was written by me to the Secretary of the Treasury than this one Exhibit 4, dated March 6, and this reply of March 20th was a reply thereto.

The letter referred to is offered in evidence, admitted and marked Exhibit 5, etc.

Mr. Isenschmid: Those letters were all sent direct to the Department at Washington?

Mr. Welch: Yes, sir.

Importers rest.

Government rests.

Case submitted.

EXHIBITS.

801869—Exhibit 1—April 19, 1916.

United States Consulate General,
City of Paris, Republic of France, ss:

Mr. ROBERT BIENAIME, being duly sworn, deposes and says as follows, to wit:

1st.—I reside in the suburbs of Paris, at No. 8 Rue Berteaux Dumas, Neuilly-sur-Seine, France.

2nd.—I am fonde de pouvoirs of the firm PARQUET & JAVAL, a co-partnership engaged in the manufacture and sale of perfumeries, at No. 19 Rue du Faubourg St. Honore, Paris, France, and whose products are known under the commercial name of Houbigant. The functions of fonde de pouvoirs are such as correspond to General Man-

ager and I have full power and authority to bind, by my signature, the firm of PARQUET & JAVAL to the same extent as either of the members of the firm.

As General Manager of the said business, I am and have been for six (6) years past fully acquainted with all the questions relating to the conducting of the said business and entirely familiar with all matters relating to prices and discounts, both wholesale and retail.

3rd.—I have read the statement reported by Mr. Howland, agent of the United States Treasury Department as

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having been made by Mr. William Clarke, one of our employees on or about the first of June, 1915.

The information given by Mr. William Clarke is absolutely incorrect and untrue. The position occupied by Mr. Clarke is a minor one; he is assistant cashier and his duties and functions consist in receiving and talking to retail clients and receiving cash payments for merchandises sold in the retail department. Mr. Clarke's position does not necessitate the possession of any particular knowledge regarding discounts to wholesale dealers, nor does his experience lead him, in any way, to the acquisition of such a knowledge.

At the time when Mr. Howland called, our chief men were absent, being mobilized on account of the war. Mr. Parquet alone, of the heads of the firm, was present, occupied at his factory outside Paris. I was mobilized myself at said time and with my regiment. Mr. Parquet was the only person properly qualified to give to Mr. Howland information regarding the wholesale discounts of the firm of PARQUET & JAVAL. I am informed Mr. Howland did not ask to see Mr. Parquet or make any effort to obtain such information from Mr. Parquet.

The only information that Mr. Clarke could have given from his experience in the firm was that of retail discounts, and he is and was in no position to obtain knowledge or information regarding the wholesale discounts which are alone known to the heads of the firm, myself and the bookkeepers of the wholesale department.

To substantiate my claim of the incorrectness of Mr. Clarke's statement, I annex hereto certified copies of invoices to several wholesale dealers from the original books of Entries and Accounts of Parquet & Javal and certified to by the United States Consulate General at Paris, which said six invoices, together with yearly statements appertaining thereto are annexed hereto and made a part hereof.

It is absolutely false and untrue that the usual wholesale discount given by Parquet & Javal is six per cent (6%); on the contrary, the usual discounts allowed to wholesale dealers by the said firm is 6, 2 and 5, to wit 13%; in some instances 6 and 10, to wit 16%; and in some instances 15 and 2½, to wit 17½.

Subscribed and sworn to before me on this fifth day of November in the year one thousand nine hundred and fifteen.

CHARLES P. PENBY,
Vice Consul of the United States of America, at Paris, France.

(Seal)

[Fee stamp.]
$2.00

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United States Consulate General,
City of Paris, Republic of France, ss:

Mr. WILLIAM CLARKE being duly sworn deposes and says as follows, to wit:

1. I reside in the suburbs of Paris, at No. 132 Rue de la Garenne, Courbevoie, Department of the Seine, Republic of France.

2nd. I am in the employ, in the capacity of assistant cashier, of Parquet & Javal, a co-partnership engaged in the manufacture and sale of perfumeries at No. 19 Rue du Faubourg St.-Honoré, Paris, France, and whose products are known under the commercial name of Houbigant. My duties consist in attending to the cash-desk and supplying general information to the retail customers in Paris regarding current questions of retail purchases. I am in no way connected with the wholesale department of the said firm of Parquet & Javal. My position in said firm is of an entirely and secondary nature and I am not connected with the direction or management of the said business.

3rd. On or about the beginning of June, 1915, Mr. L. M. Howland, an agent of the United States Treasury Department called at No. 19 Rue du Faubourg St. Honoré, at the offices of Messrs. Parquet & Javal. Mr. Howland enquired of me why fifteen per cent (15%) discount were allowed by Parquet & Javal to the firm of Park & Tilford whereas he understood that the usual discount was six per cent (6%). To this question I replied off-hand that the fifteen per cent (15%) allowed Park & Tilford was a special discount given them on account of extended purchases, but that usually six per cent (6%) only was allowed on catalogue prices. I recall distinctly that at the time I made this remark, I attached no particular importance to it and, as a matter of fact, was not in a position to give any adequate information to reply to this question which concerns the wholesale department with which I have nothing at all to do. I was very much surprised that Mr. Howland had taken this information so seriously and had evidently based a case upon the mere remarks which I made in a purely casual way.

Had I known that Mr. Howland's purpose was to really ascertain precise and accurate facts regarding the wholesale prices of the firm of Parquet & Javal, I should certainly have referred to him to Mr. Parquet who, alone

at that moment, could have given him accurate and precise information regarding the wholesale prices. In fact, it was only when a full report of Mr. Howland's conversation had been returned from America with the information that a suit had been based upon these remarks, that I realized the seriousness of my error and the importance

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attached to the inaccurate remarks I had made. I was at this time called into the office of Mr. Parquet, and when the situation was made clear to me, I fully realized the stupidity of my remarks and confessed to Mr. Parquet that I did not consider, at the time, the question asked by Mr. Howland of sufficient importance to take the trouble of enquiring of Mr. Parquet the actual wholesale discounts.

Even at the present time, I am in no position to give such information myself and I can only state under oath that the remarks made by me to Mr. Howland were based upon no positive information or knowledge appertaining to the subject of wholesale discounts and were simply based upon a general impression of the customs of the firm in retail dealings.

Subscribed and sworn to before me on this fifth day of November in the year one thousand nine hundred and fifteen.

[Fee stamp.]

WILLIAM CLARK.

(Seal.)

CHARLES P. PRENBY,
Vice Consul of the United States,
of America, at Paris, France.

No. 4919.

T. B., RE PARK & TILFORD REAPPRAISEMENT.

801869—Exhibit 2—April 19, 1916.—C. Y. K.

Feb. 24, 1916.

The Honorable the Secretary of the Treasury,
Washington, D. C.

Sir:

We beg to enclose herewith Petition, asking that you direct the reliquidation of certain entries made by Messrs. Park & Tilford of the City under the provisions of Section 3, paragraph I, and particularly the last proviso, of the Tariff Act of October 3, 1913.

We have been advised at the New York Custom House that in cases like the present one you have uniformly denied the Petition, on the ground that, as a matter of law, you have no power under the paragraph cited to direct the reliquidation where the final decision of the Board on reappraisement fixes the value at less than the entered

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value, but not as low as the invoice value, for the reason that in such a case the importer's contention is not sustained, as Section 3, paragraph I, requires.

In this connection we respectfully submit that the importer's contention is sustained under the law if the "entered value is higher than the foreign market value" according to the "final decision on reappraisement."

Yours respectfully,

HATCH & CLUTE.

A.L.B.
(Enclosure.)

In the Matter of Reappraisements Nos. 84608, etc. of Park & Tilford.

To the Honorable, the Secretary of the Treasury.

The Petition of Messrs. Park & Tilford, doing business at No. 529 West 42nd Street, in the Borough of Manhattan, City of New York, respectfully shows and alleges:—

That your Petitioners were the importers of certain merchandise at the port of New York as follows:

Reappraisement No.	Entry No.	Vessel	Date of Entry
84608,	88832,	Espagne,	Dec. 17, 1915.
84232,	77379,	La Touraine,	Nov. 27, 1915.
84168,	63614,	Rochambeau,	Nov. 3, 1915.
84166,	71835,	Espagne,	Nov. 16, 1915.
84167,	68138,	Lafayette,	Nov. 10, 1915.
83727,	63614,	Rochambeau,	Nov. 3, 1915.
83436,	48647,	"	Oct. 7, 1915.
83435,	46148,	Espagne,	Oct. 1, 1915.
83264,	42032,	La Touraine,	Sept. 24, 1915.
83263,	40876,	Chicago,	Sept. 22, 1915.
84400,	84107,	Lafayette,	Dec. 7, 1915.
84279,	79638,	Rochambeau,	Nov. 30, 1915.
83698,	58764,	La Touraine,	Oct. 25, 1915.
82724,	18179,	Netherlee,	Aug. 6, 1915.
83686,	53791,	Chicago,	Oct. 14, 1915.
84165,	71669,	Ardgaire,	Nov. 16, 1915.
82946,	29218,	Espagne,	Aug. 31, 1915.
82944,	7274,	Rochambeau,	July 14, 1915.
82945,	29218,	Espagne,	Aug. 31, 1915.
83046,	34020,	Rochambeau,	Sept. 8, 1915.

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82009,	1250,	Chicago,	July 2, 1915.
82141,	2970,	Espagne,	July 2, 1915.
82502,	15422,	Chicago,	July 31, 1915.
82503,	16819,	Espagne,	Aug. 2, 1915.
82670,	15421,	Chicago,	July 31, 1915.
82671,	10745,	La Touraine,	July 20, 1915.
82723,	20947,	Rochambeau,	Aug. 10, 1915.
82725,	25018,	La Touraine,	Aug. 18, 1915.

That on making entry your Petitioners had then pending a similar case on appeal for reappraisement wherein the Appraiser had advanced the entered value of the merchandise in question, and your Petitioners therefore in order to meet the advances by the Appraiser in said case certified at the time of entry that the entered value in the cases covered by this Petition was higher than the foreign market value, and that the goods were so entered in order to meet advances by the Appraiser in similar cases then pending on appeal for reappraisement.

That this action was taken by your Petitioners in good faith, and that before taking the same your Petitioners made inquiry of the seller abroad and other wholesale dealers in France, and were advised that their action was proper and could be sustained by adequate evidence, and your Petitioners thereupon immediately took steps to secure such evidence in support of their position.

That your Petitioners procured the sworn evidence of the manufacturer and true copies of Bills of Sale, duly authenticated, of similar goods sold to other wholesale dealers in the principal markets of France, and likewise procured the sworn evidence of said dealers themselves corroborating and sustaining the evidence of the seller covering actual transactions in the wholesale markets of France at or about the time of the shipment of the goods in question.

That further the Manager of the Department of your Petitioners importing the goods in question had occasion to go to Paris, France, at the time these matters were pending before the Board of Appraisers, and while there persuaded the seller to take his original books of account to the American Consul for examination and verification, and procured full extracts to be taken therefrom showing numerous sales at wholesale to various dealers in France of goods of the kind in question, and said extracts from said books were duly sworn to and authenticated by the American Consul and were afterwards received in evidence before the Board of United States General Appraisers in these cases. That the evidence so procured by your Petitioners showed wholesale discounts ranging from six, two and five per cent, which was the lowest, to as much as eighteen per cent, whereas the discount your Petitioners had been allowed, which was the subject matter of dispute on reappraisement, was fifteen per cent, so that

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your Petitioners felt reasonably assured that on the evidence fifteen per cent represented a fair average wholesale discount in actual transactions among wholesale dealers in the principal markets of France of the goods in question.

That the Board of United States General Appraisers on said re-reappraisement fixed said discount at six, two and five, which was the lowest wholesale discount shown to be allowed to wholesalers in the evidence produced by your Petitioners.

That with respect to the facts herein set forth your Petitioners refer to the record before the Board of United States General Appraisers herein.

WHEREFORE your Petitioners pray that the Collector of Customs at the port of New York be directed to assess duty upon the basis of the appraised value as found

by the Board of United States General Appraisers, or a single General Appraiser, in cases where the latter followed the full Board decision, and for such other or further relief in the premises as may be just.

PARK & TILFORD,
Petitioners.

By HATCH & CLUTE,
Attorneys for Petitioners,
100 Broadway, New York City.

Dated, New York, February 24th, 1916.

801869.—Exhibit 3.—April 19, 1916.—C. Y. K.

Treasury Department,
Office of the Secretary,
Washington, March 2, 1916.

Messrs. Hatch & Clute,
100 Broadway, New York, N. Y.

Gentlemen:

The Department acknowledges the receipt of your letter of the 24th ultimo, transmitting a petition by Messrs. Park & Tilford, for reduction of the entered value of a number of entries numerated therein, on which advances had been made by the importers under the provisions of paragraph I, of section III, of the tariff act.

You state that you have been advised by the customs officials in New York, that the Department has uniformly denied similar applications on the ground that as a matter of law, the Secretary of the Treasury has no power, under

the paragraph cited, to direct the reliquidation of entries where the final reappraised values are less than the entered values, but not as low as the invoice values, for the

reason that in such cases the importer's contention is not sustained.

You are advised that in all cases where the importer has failed to make a specific contention as to market value, the Department regards the contention as being for the invoice value; and where the final reappraised value is below the entered value but not as low as the value contended for by the importer, it is the practice of the Department to decline to authorize a reduction of the entered value, on the ground that the importer's contention has not been sustained. This practice is based upon the Department's knowledge of the purpose and intent of the law, and is of such long standing that it will not make any change therein.

You are advised therefore, that if the entries enumerated in your petition come within the class mentioned above, the Department's final action with reference thereto, would necessarily be in accordance with its practice outlined above.

Respectfully,

F. M. HALSTEAD,
Chief, Division of Customs.

No enclosure.

T. B. 547 Reappraised Value.

801869.—Exhibit 4.—April 19, 1916.—C. Y. K.

March 6th, 1916.

The Honorable the Secretary of the Treasury:

Division of Customs, Washington, D. C.

Sir:

We acknowledg your favor of March 2nd, your file number 101237.

We beg to advise that the importer in this case only sought to show the market value of the goods in question,

claiming that the appraiser's value was higher than the true market value, and such turned out to be the fact according to the final decision on re-reappraisement. The importer did not contend for the invoice value. This is shown by the fact that the importer voluntarily produced a variety of evidence tending to show that the invoice value even was too low. The question was approached in a broad way and all the evidence which the importer could secure, even against the importer's invoice value, was produced and offered in evidence.

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We respectfully submit it would not be equitable to take the view that the importer was contending for the invoice value when the importer of his own motion, and without compulsion produced evidence that the invoice value was too low. If the importer had been contending for the invoice value, then we may suppose the evidence which would go to sustain the invoice value which had been procured would have been offered and the evidence which was against the invoice value would have been withheld.

We submit, therefore, that on a state of facts showing such an attitude on the part of the importer it is enough if under the law the importer shows on final appraisal that the entered value is higher than the market value.

We appreciate that if an importer takes a definite stand, and introduces only the evidence tending to support such a definite contention, then a different rule of law might obtain. When an importer does everything in his power to have the true market value fixed, and produces evidence both for and against his own interests, then he should be given relief if it is demonstrated by final decision that the entered value is higher than the market value.

Yours respectfuliy,

HATCH & CLUTE.

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T. B. 547 Reappraised Value.

801869.—Exhibit 5.—April 19, 1916.—C. Y. K.

Treasury Department, Washington,

March 20, 1916.

Messrs. Hatch & Clute,
100 Broadway,
New York, N. Y.

Gentlemen:

The Department acknowledge the receipt of your letter of the 16th instant, relative further to the petition by Messrs. Park & Tilford, for reduction of the entered value of a number of entries enumerated therein, on which advances have been made by the importers under the provisions of paragraph I of section III of the tariff act, and which was the subject of the Department's letter of the 2nd instant confirming the advice given you by the Collector of Customs at New York to the effect that similar applications have been denied uniformly by the Department on the ground that the Secretary of the Treasury has no power under the law to direct reduction of the entered values

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where the final reappraised values are less than the entered values but not as low the values contended for by the importers at the time of entry.

You now state, in effect, that the importer in these cases made no specific contentions for market value at the time of entry, but endeavored to show before the General Appraiser what the market value of the merchandise really was, regardless of whether or not that value was represented by the invoice value, with the result that the market value ultimately was found to be above the invoice value, but not as high as the entered value which was approved by the local appraiser.

The advice contained in the Department's previous letter was based entirely on the abstract question presented in your letter of February 24th, as to what the practice of the Department is in such cases, without having before it the entries to which your question pertains.

The statute in question requires as a condition precedent to relief in such cases, that an importer shall have made his advances after due diligence and inquiry on his part, relative of course to the market value of the merchandise; and therefore contemplates that the importer, having made the inquiry required, has obtained knowledge relative to the market value, and should make his entry accordingly. If such diligence has been exercised, and inquiry made, the importer certainly is in a position to state definitely, at the time of entry, what he believes to be the market value of the merchandise, on which he has made advances to meet the previous advances by the appraiser; and in all cases where he fails to state what he believes the market value to be, it has been the practice of the Department to construe his contention for the invoice value.

Reply to your letter has been delayed pending the issuance of Treasury Decision No. 36221, which covers fully the conditions presented in the petition of the importers; and in accordance with the principles set forth therein, you are again advised that if the entries enumerated in the petition were reappraised at values below the entered values but not as low as the invoice values, no specific contention for values having been made by the importers at the time of entry, the Department necessarily would have to deny an application for reduction of the entered values of the entries, in accordance with its previous practice.

Respectfully,

W. M. MALBURN,
Assistant Secretary.

No inclosure.

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DECISION OF THE BOARD.

Board of United States General Appraisers.

May 8, 1916.

In the matter of protest of Park & Tilford, No. 801869/5590 against the decision of the Collector of the Port of New York.

Board Three.

Before WAITE and HAY, *General Appraisers.*

HAY, *General Appraiser,* delivered the opinion of the Board:

This protest is against the action of the collector in the liquidation of an entry in which the importer had invoked the provisions of paragraph "I," section III, tariff act of 1913, and entered the merchandise higher than it was invoiced because of a reappraisement then pending. All of the questions here involved were considered by this Board in Mills & Gibb's case, G. A. 7893 (T. D. 36347), and the conclusion reached in that case must be controlling in the case at bar. For the reasons given in that decision the protest is overruled.

BYRON S. WAITE,

EUGENE G. HAY,

Board of U. S. General Appraisers.

Endorsed: United States Court of Customs Appeals. Filed May 17, 1916. Arthur B. Shelton, Clerk.

"Schedule B."

(Opinions in Customs Court of Appeals in Mills & Gibb's case.)

(T. D. 37164.)

Legality of liquidation.

MILLS & GIBB *v.* UNITED STATES (No. 1707).

CONSTRUCTION, PARAGRAPH I, SECTION 3, TARIFF ACT OF 1913—ENTERED, HIGHER THAN MARKET VALUE.

The provisions of paragraph I of section 3, tariff act of 1913, were designed by Congress to vest in the Secretary of the Treasury the sole and exclusive authority to direct assessment of duty upon an amount less than the entered value of the merchandise. Where goods were entered at a value higher than that stated in the invoice, with a certificate that this was done to meet advances made by the appraiser in similar pending cases, and the final appraisement was between the entered and invoice values, the refusal of the Secretary of the Treasury to direct the collector to assess duty upon less than the entered value is not reviewable upon appeal by the Board of United States General Appraisers or the United States Court of Customs Appeals.

United States Court of Customs Appeals, April 11, 1917.

APPEAL from Board of United States General Appraisers, G. A. 7893 (T. D. 36347). [Affirmed.]

Curie, Smith & Maxwell (*Thomas M. Lane* of counsel) for appellants.

Bert Hanson, Assistant Attorney General, for the United States.

[Oral argument Oct. 10, 1916, by Mr. Lane and Mr. Hanson.]

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, *Judges*.

MARTIN, *Judge*, delivered the opinion of the court:

The merchandise in this case consists, of certain window curtains which were dutiable at an undisputed ad valorem rate of duty under the tariff act of October 3, 1913. Duty was assessed at that rate upon the merchandise at its entered value. The sole issue in the case arises upon a contention of the importers that duty should have been assessed upon the merchandise at a valuation fixed by its final reappraisement, which was less in amount than the entered value. This claim was made under the following provisions of paragraph I of section 3 of the act:

> * * * The duty shall not, however, be assessed in any case upon an amount less than the entered value, unless by direction of the Secretary of the Treasury in cases in which the importer certifies at the time of entry that the entered value is higher than the foreign market value and that the goods are so entered in order to meet advances by the appraiser in similar cases then pending on appeal for reappraisement, and the importer's contention shall subsequently be sustained by a final decision on reappraisement, and it shall appear that the action of the importer on entry was taken in good faith, after due diligence and inquiry on his part, and the Secretary of the Treasury shall accompany his directions with a statement of his conclusions and his reasons therefor.

The facts in the case were brought upon the record by a written stipulation of the parties. It appears that on November 14, 1913, merchandise of the same character as this was imported into this country by the same importers, and was entered for duty at the invoice price. The local appraiser,

however, found the actual market value of the merchandise to be 20 per cent in excess of the invoice price, and reported accordingly. The importers duly appealed for a reappraisement of the merchandise, and on February 11, 1914, the appellate general appraiser found the actual market value of the merchandise to be 5 per cent in excess of the invoice price aforesaid. No appeal was taken from this appraisement; it therefore remained the final reappraisement of the merchandise.

On February 7, 1914, the present merchandise, which as already stated is of the same character as the foregoing, was entered by the importers. At the time of this entry the appeal for reappraisement in the former case was still pending. In the latter case, therefore, the importers in declaring the value of the merchandise upon entry added 20 per cent to the invoice price thereof, stating that this addition was made by them in order to meet the advances which had been made by the appraiser upon the former importations, which were then pending upon an appeal for reappraisement, at the same time certifying that the entered value of the merchandise as thus increased was higher than its actual foreign market value to the extent of the aforesaid addition. The local appraiser having approved of the entered value of this importation as thus increased, the importers appealed for a reappraisement, and afterwards, to wit, on March 18, 1914, the single general appraiser who heard the appeal appraised the merchandise at the invoice price, plus 5 per cent increase. No appeal was taken from this reappraisement.

It may be repeated, in other words, that the first importations were entered at their invoice price; that this valuation was advanced 20 per cent by the

local appraiser; that upon appeal the general appraiser reduced this addition to 5 per cent; that the second importations, the merchandise being similar to the first, were entered while the foregoing appeal for reappraisement was pending; that their value was entered by the importers at the invoice price, plus 20 per cent, in order to meet the advance made by the local appraiser in the first case; and that the second importations, like the first, were finally reappraised at the invoice price, plus 5 per cent. It appears therefore that the invoice price as first declared by the importers was not exactly sustained by the final reappraisement, nor was the advance of 20 per cent made by the local appraiser finally sustained, for the final reappraisement declared the actual market value of the merchandise to be the invoice price, plus an addition of 5 per cent only.

Under these circumstances the importers claimed that the second importations were within the favor of the statute first above copied, and that the Secretary of the Treasury should direct the collector to assess duty upon the invoice price of the merchandise, plus 5 per cent, as determined by the final reappraisement thereof, notwithstanding the fact that entry had been made at the invoice price, plus 20 per cent. In support of this contention the importers addressed the Secretary of the Treasury as follows:

JUNE 18, 1914.

The honorable the SECRETARY OF THE TREASURY,

Washington, D. C.

DEAR SIR: We respectfully request that in the liquidation of the entries mentioned below duty may be assessed upon the values found upon reappraise-

ment, which are less than the entered values. The entries in question are as follows:

Reappt. No.	Entry No.	Date of entry.	Vessel.
73315	39843	Feb. 7, 1914	*St. Paul.*
73667	43051	Feb. 11, 1914	*Minneapolis.*

In making these entries we added 20 per cent to the invoice values of the goods in order to meet advances made by the appraiser on entries 320221, November 14, 1913, ex steamship *Vaderland;* 329554, November 24, 1913, ex steamship *Majestic,* then pending on appeal for reappraisement and covered by reappraisements 72582 and 73072, respectively, the character of the merchandise covered by all four entries being identical. We certified, at the time of making the additions upon entry, that the entered value was higher than the foreign market value and that the goods were so entered to meet advances by the appraiser.

The merchandise in question consists of window curtains made up by mounting a lace frame of somewhat elaborate design upon plain net. The lace frame constitutes from 75 to 80 per cent of the value of the curtains, and the net and the cost of mounting are very slight factors in the cost of the finished article. The profit on the lace frame and the profit on the net were fully included in the invoice values. These values also included a further addition equivalent to 30 per cent of the cost of mounting and 3 per cent over all costs and profits already included. The appraiser made a flat addition of 20 per cent over and above all such elements of costs and profits. No attempt was made at the hearing of the case to justify the advance of 20 per cent. The general appraiser, after a thorough hearing and careful consideration of the evidence, decided upon an addition of 5 per cent to our entered values. While we believe that our invoice prices were fully justified, we have accepted this advance, as we prefer that there should be no controversy with the Government respecting the values of these goods. The Government also accepted the reduction from 20 per cent advance to 5 per cent advance and took no appeal to a board of three general appraisers.

The additions upon entries 39843 and 43051 were made in good faith, after due diligence and inquiry upon our part. We were thoroughly familiar with the facts connected with the manufacture of these curtains and were also satisfied from the outset that the advance was excessive; nevertheless, we preferred to make the additions upon entry and avoid possible penalties.

The general appraiser having taken the same action on entries 39843 and 43051 as was taken upon 320221, viz., having added 5 per cent to our invoice values, we submit that the entries the subject of this application should be liquidated upon that basis rather than upon the entered values.

Very respectfully,

(Signed) MILLS & GIBB.

The foregoing application was considered by the Secretary and was denied. The Secretary thereupon addressed the following communication to the collector:

TREASURY DEPARTMENT,

Washington, July 28, 1914.

To the COLLECTOR OF CUSTOMS,

New York, N. Y.

SIR: The department has to refer to your letter of the 6th instant, returning the application of Messrs. Mills & Gibb for the reduction of the entered value under the provisions of paragraph I of section 3 of the current tariff act of certain lace window curtains covered by entries Nos. 39843 and 43051 of February, 1914, which were advanced in value by the importers to meet advances made by the appraiser on similar merchandise covered by former entries Nos. 320221 and 329554, then pending on appeal to reappraisement.

It appears that the appraiser added 20 per cent for market value on the former entries referred to, and that on appeal to reappraisement the general

appraisers sustained an advance of only 5 per cent on the entered value, which was also the invoiced value.

It further appears that the appeal to reappraisement on the entries which are the subject of the application and on which an advance of 20 per cent had been made by the importers resulted in an addition of only 5 per cent to the invoiced values.

The importers stated at the time of making entry that the advances were made to meet former advances by the appraiser on similar merchandise, and that the entered values were higher than the market values to the extent of the advances made by them.

Inasmuch as the contention of the importers was not sustained as to market value, the department must deny their application for a reduction of entered values.

You will therefore liquidate entries Nos. 39843 and 43051 on the basis of the entered values.

The four entries in question and all papers pertaining thereto are returned under separate cover.

Respectfully,

(Signed) WM. P. MALBURN,
Assistant Secretary.

Thereafter the Secretary, in response to another communication from the importers, addressed a second letter to the collector, reading as follows:

TREASURY DEPARTMENT,

Washington, September 23, 1914.

To the COLLECTOR OF CUSTOMS,

New York, N. Y.

SIR: The department acknowledges the receipt of your letter of the 9th instant, returning a letter from Thomas H. Watson, manager of the curtain department of Mills & Gibb, requesting a refund of part of the duties paid by the firm on certain curtains covered by entries Nos. 320221, 329554, 39843, and 43051.

It appears that the invoiced value of the merchandise covered by the first two entries was advanced in value 20 per cent by the appraiser, and only a 5 per cent advance was sustained on reappraisement, and that the entries were therefore liquidated on the basis of the reappraised value.

They therefore can not be considered under the provisions of paragraph I of section 3 of the tariff act pertaining to a reduction of the entered values.

It further appears that the last two entries were advanced in value 20 per cent by the importers to meet advances by the appraiser in the two previous cases mentioned above, and that the importers claimed the entered values were higher than the foreign market values "to the extent of the additions." On reappraisement of the merchandise, values were returned only 5 per cent in advance of the invoiced values. The importers therefore request a refund of duties on the 15 per cent advance which was not sustained.

Under date of July 28 last the department denied the application of the importers for a reduction of the entered values on the entries in question on the ground that the importers' contentions were not sustained.

In view of the fact that the importers claimed the entered values to be higher than the foreign market values "to the extent of the additions," they clearly contended that the invoiced values correctly represented the foreign market values; and inasmuch as their contentions were not sustained, the department had no other alternative than to deny their application, and is therefore without authority to grant any relief in the matter.

Respectfully,

(Signed) A. J. PETERS,
Assistant Secretary.

The collector accordingly assessed duty upon the merchandise at its entered value instead of its reappraised value.

The importers protested against the assessment in the following terms:

SIR: We hereby protest against your decision, liquidation, and assessment of duties as made by you on our importations below mentioned, consisting of certain curtains, curtain nets, or other merchandise contained in the cases or packages marked and numbered as described on the entries and invoices thereof, to which for more certainty of description reference is hereby had, claiming that you have erroneously assessed duty upon certain additions made to the invoice values by the importers to meet advances made by the appraiser, and that the true value of the goods is the reappraised value.

Claiming further that application for remission of duty under paragraph I of section 3 of the tariff act of October 3, 1913, has been erroneously disallowed.

We give notice that we pay all other higher rates than is claimed above as the legal rate under compulsion and to obtain possession of our goods. We claim that the duty exacted by you is not the legal duty chargeable upon said goods, holding you and the Government responsible for all excess of duty exacted by you upon said goods above the legal duty.

The protest was submitted to the Board of General Appraisers and was overruled. The importers appeal.

For convenience of reference the controlling provisions of the statute will be copied again at this point.

Paragraph I of section 3:

* * * The duty shall not, however, be assessed in any case upon an amount less than the entered value, unless by direction of the Secretary of the Treasury in cases in which the importer certifies at the time of entry that the entered value is higher than the foreign market value, and that the goods are so entered in order to meet advances by the appraiser in similar cases then pending on appeal for reappraisement, and the importer's contention shall

subsequently be sustained by a final decision on reappraisement, and it shall appear that the action of the importer on entry was taken in good faith, after due diligence and inquiry on his part, and the Secretary of the Treasury shall accompany his directions with a statement of his conclusions and his reasons therefor.

It appears that the fundamental difference between the interpretation which the Secretary places upon these provisions and that adopted by the importers relates to the requirement in the act that the Secretary shall grant relief thereunder only in cases wherein "the importer's contention shall subsequently be sustained by a final decision on reappraisement." The importers claim that the so-called "contention" intended by the act is simply the statutory contention which importers must make when they appeal for a reappraisement of merchandise, namely, that they "deem the appraisement thereof too high." They claim that this contention should be held to be "sustained" whenever the final reappraisement discloses that the value as advanced by the appraiser is too high, even though the reappraisement may not sustain the precise entered value of the merchandise. On the other hand, the Secretary defines the "contention" aforesaid to be the valuation which the importers place upon the merchandise when they enter it for duty. The Secretary therefore holds that importers can not be entitled to the relief provided by the paragraph unless the final appraisement exactly sustains the entered value thereof.

In the present case accordingly the Secretary refused to direct the collector to assess duty upon an amount less than the entered value of the merchandise, but to the contrary instructed him to assess duty upon the full entered value thereof. This

instruction, of course, did not arm the collector with any new authority in the premises, but simply required him to perform whatever duty was imposed upon him by statute in the absence of special instructions in behalf of the importers. Under these circumstances the collector was bound by the letter of the law at least to assess duty upon the entered value of the merchandise, and this he did.

The importers contend that the Secretary was in duty bound under the circumstances to direct the collector to assess duty upon only the appraised value of the merchandise; that the record discloses that he refused to perform this duty because he misinterpreted the law as expressed in the paragraph; that the necessary facts were before the board and are now before the court to show that the importers were entitled of right to such a direction from the Secretary, those facts being the similarity of the several importations, the appraiser's advance and the appeal to reappraisement in the first case, the importers' advance and certificate at entry in the second case, the final decision upon reappraisement sustaining the importers' contention, and also good faith, due diligence, and inqury upon the part of the importers; and that these facts appearing the board should have sustained the protest, notwithstanding the refusal of the Secretary to issue the statutory directions to the collector in the premises and that the court should now accordingly reverse the decision of the board, since it failed to sustain the protest.

We think, however, that the provisions of paragraph I, above quoted, were designed by Congress to vest in the Secretary the sole and exclusive authority to direct assessment upon an amount less than the entered value of the merchandise and that

a refusal by him in any case to direct such an assessment is not reviewable by the board or this court upon an appeal from the collector's assessment in such case.

In the customs administrative act of 1890 it was enacted that "the duty shall not, however, be assessed in any case upon an amount less than the invoice or entered value." (Par. 7.)

In the tariff act of 1909 it was enacted that "the duty shall not, however, be assessed in any case upon an amount less than the entered value." (Subsec. 7, sec. 28.)

In paragraph I, *supra*, of the tariff act of 1913, Congress reenacted this provision of the tariff act of 1909, but committed to the Secretary the authority in given cases to direct an assessment of merchandise at its reappraised value even though this be less than the entered value. A reading of the paragraph discloses that the authority which is thereby vested in the Secretary is not formal or ministerial in character but is quasi judicial. In the exercise of it the Secretary is called upon to inquire whether a proper certificate has been filed by the importers at entry, whether a similar case was then pending upon appeal for reappraisement, whether the importers' "contention" therein has subsequently been sustained by a final decision upon reappraisement, and whether the action of the importers at entry was taken in good faith and after due diligence and inquiry upon their part. This requires an examination by the Secretary into the facts and circumstances of the case, and a quasi judgment upon the questions just enumerated. *Decatur* v. *Paulding* (14 Pet., 497-514); *United States ex rel. Dunlop* v. *Black* (128 U. S., 40-48). The act does not provide for an appeal from a re-

fusal by the Secretary to direct an assessment in the exercise of this authority, nor is there any provision for preserving or reviewing the evidence upon which the Secretary may have acted in such a case, nor can it be doubted that Congress possessed the power to entrust this authority to the Secretary without granting an appeal from his decision in such cases. The paragraph in question provides that the Secretary in cases wherein he may direct assessment upon an amount less than the entered value shall accompany his directions with a statement of his conclusions and his reasons therefor. But there is no requirement in the law that he shall file any statement in cases wherein he may refuse to direct such assessment.

It should be noted furthermore that the Secretary of the Treasury, in issuing directions to the collector under the statute aforesaid, is expressly restricted to cases wherein "it shall appear that the action of the importer on entry was taken in good faith, after due diligence and inquiry on his part." The present record does not disclose affirmatively that the Secretary has found in favor of the importers upon these points in this case.

On the other hand the authority granted to the Secretary by the paragraph in question is distinctly denied to the collector. That officer is neither empowered nor permitted to examine or decide as to the facts upon which the relief of the importers is made to depend. The paragraph expressly provides that the collector shall in no case assess duty upon an amount less than the entered value, unless directed to do so in certain cases by the Secretary. The assessment in the present case therefore does not rest upon the instructions addressed to the collector by the Secretary in his first letter,

above copied, but upon the imperative mandate of the law which defines the duties of the collector in the absence of a direction by the Secretary for a reduced assessment. And it should be remembered in this connection that it is the action or decision of the collector which may be challenged by protest, and that this makes up the issue which goes to the board for decision, and which may be appealed to this court. (Par. N of sec. 3, tariff act of 1913.)

We are not unmindful of the fact that cases may be cited wherein some erroneous action of the Secretary, or of an appraiser or appraising board, or of a weigher, or gauger, may have entered affirmatively into an actual assessment and become a part of it in such a manner as to affect the assessment itself with reversible error. The instant case, however, is not within that rule. *Morrill* v. *Jones* (106 U. S., 466); *United States* v. *Passavant* (169 U. S., 16); *United States* v. *Beebe* (122 Fed., 762).

We are referred also to the case of *Bowling Green Storage Co.* v. *United States* (3 Ct. Cust. Appls., 309; T. D. 32588) in support of the importers' contention. The concluding paragraph of the decision in that case, however, will serve without other explanation to differentiate it from the present case. The court said:

We construe the law as authorizing a determination by the collector, as in ordinary cases, under rules and regulations to be prescribed by the Secretary of the Treasury. It follows that a right of appeal from such determination exists under the authority of subsection 29 of section 28 of the act of 1909.

In respect to the present issue, however, we are convinced that Congress did not intend the provisions of paragraph I, now in question, "as authorizing a determination by the collector, as in

ordinary cases, under rules and regulations to be prescribed by the Secretary of the Treasury," but rather that the authority to decide upon a reduction of the dutiable valuation to an amount less than the entered value was entirely withheld from the collector and was committed to the Secretary of the Treasury alone.

We are also cited to the provisions of paragraph Y of section 3 of the tariff act of October 3, 1913, whereby authority is granted to the Secretary of the Treasury to correct manifest clerical errors in certain entries and liquidations and to refund money paid in excess of lawful duty in certain cases. It is contended that the board and this court have in divers cases assumed jurisdiction to review the exercise of this authority by the Secretary, and that upon the same principle the action of the Secretary in the present case may be reviewed. In answer to this, however, it is sufficient to say that the terms of the respective paragraphs thus placed in comparison are radically different, and that at an early date the Treasury Department under enactments similar to paragraph Y undertook to depute the authority in question to the collectors. (Treasury Regulations, 1884, Article 611; T. D. 7925; T. D. 10534.) This course of procedure, regardless of any question concerning its correctness, impairs the value of the cited provision as an analogy in this case.

The decision of the board is *affirmed*.

DISSENTING OPINION.

DE VRIES, *Judge*: I am unable to concur with my colleagues herein.

This is one of several appeals constituting test cases seeking construction of the last portion of

paragraph I of sectio[n] 3 of the tariff act of 1913, hereinafter quoted.

While in the brie[fs] and at the oral argument several minor issues w[ere] raised, I think these either answered by the recor[d] itself or such as discussion and particular determ[ination] would not affect the conclusion.

At the threshold o[f] orderly inquiry we are met with the challenge b[y] the Government, appellee here, that the Board of General Appraisers was without jurisdiction of the case, and upon that issue the board held with th[e] Government. Preliminarily there should be borne in mind the distinction between jurisdiction to *hear and determine* issues of law or fact and jurisdiction or power to *enforce a decree* based upon such determination. If I read correctly the conclusion of the board it was apprehension as to its powers in the latter respect rather than its interpretation of the law which controlled decision. The majority opinion herein takes the broad view that the board has neither jurisdiction to hear and determine nor to enforce action in the premises. In statutory tribunals of special jurisdiction, the powers of which are derived solely from and are limited strictly by the organic law of their creation, such powers are not always coincident. Oftentimes the power of enforcement of their own judgments and decrees is not granted such tribunals by Congress. There is sound reason for this under constitutions like ours, the fundamental principle of government under which is the separate and independent powers of the judicial, legislative, and administrative branches thereof, for the reason that the contrary might lead to conflict between these coordinate divisions of the public service. Notable of such cases are those of the class before us wherein

the decision of the tribunal of judicial functions concerns the duties and performances of an administrative division of the Government. It is neither strange nor unseemly that in such instances Congress should create tribunals empowered to hear and determine cases, construing facts and the law, to be administered by a coordinate branch of the public service, without adding the power in the judicial branch to enforce its decisions. Congress, no doubt, under such conditions, assumes that each as well as the other department of the Government will perform its duties in due and full observance of the law and official obligation; and, that where Congress has confided the interpretation or construction of a law to one tribunal, and such has in a particular case been invoked and had, that there is no controlling reason for a power of mandate, the decision being addressed to sworn officials of another branch of the Government entrusted with enforcement of the law as construed by such judicial tribunals. These officials are equally responsible for and observant of their official conduct under the obligations of their official oaths and are without interest, save that the rights of the citizen and taxpayer shall be administered according to the law as interpreted by the legally constituted tribunals of due jurisdiction. Herein, as in all other cases, the *statute as construed* is the warrant and command of action. Such is far different from decrees concerning private interests moved solely by the extent of that interest and uncontrolled by the obligations of public duty and official oaths and bonds.

Accordingly, this being a case concerning the performance of prescribed statutory duties of public officials, we are to ascertain not necessarily that

there is an *enforceable* jurisdiction in the board, but whether or not there is a jurisdiction to *hear* and *determine* the rights and duties of the respective parties litigant. Having duly so heard, determined, and declared the law, its enforcement may, without discredit to either, but with equal credit to both, departments of the Government, reside in the obligation of official duty, the statute as construed being the mandate of performance. The power of the Board of General Appraisers, therefore, to themselves "compel" performance by the Secretary of the Treasury or collector of action decreed by the board is not necessary to their exercise of jurisdiction to hear and determine the law and facts governing either in a particular case.

Bearing in mind this particular fundament, examination of the issues will be facilitated by adverting to the enactment designed to prevent, and a brief resume of, the evils complained of and a review of the defined and adjudged powers of the adjudicating tribunal. In so far as immediately pertinent, the statute is the last portion of paragraph I of section 3, customs administrative act of 1913, reading:

The duty shall not, however, be assessed in any case upon an amount less than the entered value, unless by direction of the Secretary of the Treasury in cases in which the importer certifies at the time of entry that the entered value is higher than the foreign market value and that the goods are so entered in order to meet advances by the appraised in similar cases then pending on appeal for reappraisement, and the importer's contention shall subsequently be sustained by a final decision on reappraisement, and it shall appear that the action of the importer on entry was taken in good faith, after due diligence and inquiry on his part, and the Secretary of the Treasury shall accompany his direc-

tions with a statement of his conclusions and his reasons therefor.

The reason for the enactment, and I think correct interpretation of its intended method of operation, are correctly and succinctly set forth in the Government's brief as follows:

Paragraph I imposes heavy additional duties upon merchandise which is entered at less than its market value. Often an importer confronts a dilemma. Assume that on an initial entry the local appraiser advances the value over the entered value and the importer appeals to reappraisement. While that appeal is pending and the question of market value is still unsettled, the importer makes a second entry of similar merchandise. He does not know at what value to make the second entry. If he enters at the value he used on the initial entry, he may incur additional duties. If (not using the privilege given by paragraph I) he enters at the advanced value put on the initial entry by the local appraiser, the importer has to pay duties on that value even though on the initial entry he subsequently sustains his contention by a final decision on reappraisement. In short, by entering at the advanced value he may pay more duties than he ought to pay. To relieve his embarrassment paragraph I provides another course for him. Under that he may make his second entry at the higher value and file therewith his certificate that he has advanced to meet the advance made by the appraiser on the similar first entry. By so doing he places himself in a position to get the benefit of the test case. If he loses the test case he has avoided the additional duties he would have incurred had he made his second entry at what he believed to be the market value. If his contention in the test case be sustained, the Secretary of the Treasury will direct that duty be assessed on less than the entered value.

The material facts of the instant case epitomized from the record are that the first importation was entered at the invoice value or amount, raised by the

local appraiser 20 per cent, and, for lack of further appeal by either party, finally fixed by a general appraiser at 5 per cent advance over the invoice value or amount. Pending that final appraisement by the general appraiser, and, upon a second importation of similar goods, the importers entered them at 20 per cent advance, duly certifying at the time of entry that they were so entered "in order to meet advances made by the appraiser" in the first or test case, and, further certifying: "We hereby certify that the entered value is higher than the foreign market value to the extent of the above-mentioned addition" (20 per cent). The importers likewise appealed the second case and the general appraiser made advance therein also of 5 per cent above the invoiced value or amount which, also for want of appeal by either party, became final. On application of the importers to the Secretary of the Treasury for refund under the provisions of said paragraph I the Secretary, denying such, wrote the collector stating as his sole ground of denial as follows:

Inasmuch as the contention of the importers was not sustained as to market value, the department must deny their application for a reduction of entered values.

Adding:

You will therefore liquidate entries Nos. 39843 and 43051 on the basis of the entered values.

A later letter from the Secretary was of substantially the same effect, the sole and only ground of denial being that the importers' "contention" in the first case had not been sustained within said paragraph I. No express finding as to the importers' good faith, diligence, or inquiry was had or communicated to the collector.

That the conception of the majority, of the record and tendered issues may be accurately stated and fully presented, I quote therefrom as follows:

It appears that the fundamental difference between the interpretation which the Secretary places upon these provisions and that adopted by the importers relates to the requirement in the act that the Secretary shall grant relief thereunder only in cases wherein "the importer's contention shall subsequently be sustained by a final decision on reappraisement." The importers claim that the so-called "contention" intended by the act is simply the statutory contention which importers must take when they appeal for a reappraisement of merchandise, namely, that they "deem the appraisement thereof too high." They claim that this contention should be held to be "sustained" whenever the final reappraisement discloses that the value as advanced by the appraiser is too high, even though the reappraisement may not sustain the precise entered value of the merchandise. On the other hand, the Secretary defines the "contention" aforesaid to be the valuation which the importers place upon the merchandise when they enter it for duty. The Secretary, therefore, holds that importers can not be entitled to the relief provided by the paragraph unless the final appraisement exactly sustains the entered value thereof.

In the present case, accordingly, the Secretary refused to direct the collector to assess duty upon an amount less than the entered value of the merchandise, but to the contrary instructed him to assess duty upon the full entered value thereof. This instruction, of course, did not arm the collector with any new authority in the premises, but simply required him to perform whatever duty was imposed upon him by statute in the absence of special instructions in behalf of the importers. Under these circumstances the collector was bound by the letter of the law, at least, to assess duty upon the entered value of the merchandise, and this he did.

The importers contend that the Secretary was in duty bound, under the circumstances, to direct the

collector to assess duty upon only the appraised value of the merchandise; that the record discloses that he refused to perform this duty because he misinterpreted the law as expressed in the paragraph; that the necessary facts were before the board and are now before the court to show that the importers were entitled of right to such a direction from the Secretary, those facts being the similarity of the several importations, the appraiser's advance and the appeal to reappraisement in the first case, the importers' advance and certificate at entry in the second case, the final decision upon reappraisement sustaining the importers' contention, and also good faith, due diligence, and inquiry upon the part of the importers; and that, these facts appearing, the board should have sustained the protest notwithstanding the refusal of the Secretary to issue the statutory directions to the collector in the premises, and that the court should now accordingly reverse the decision of the board since it failed to sustain the protest.

We think, however, that the provisions of paragraph I, above quoted, were designed by Congress to vest in the Secretary the sole and exclusive authority to direct assessment upon an amount less than the entered value of the merchandise, and that a refusal by him in any case to direct such an assessment is not reviewable by the board or this court upon an appeal from the collector's assessment in such case.

I can not concur fully in this recital in so far as it relates to the claims of the importers upon this appeal. It is true that they, among other matters, pray for an order of this court directing reliquidation upon the appraised value of the merchandise, but I do not discover any claim upon their part that they "were entitled of right to such a direction from the Secretary." It appears to me rather that the importers' main contention was and is that the Secretary's action was void, that con-

sequently the collector's original liquidation was void, *and* they therefore ask that this court direct liquidation upon the appraised value of the merchandise. It is my view that the Secretary's action was void and it is within the board's jurisdiction to so declare. Having so determined the law of the case I do not, however, agree that the importers are entitled to the order of reliquidation at the appraised value, but are entitled to *valid* action upon their petition by the Secretary, in which undoubtedly he would proceed in accordance with the final decision of the tribunal established by Congress to declare such. It is beyond my slightest conception that, after litigating the question to final decision, either the collector or Secretary of the Treasury would for a moment entertain the slightest inclination to defeat that decision by nonaction or action contrary to the duly declared rule of action regardless of any power of, or issuance of, mandate.

It is seriously controverted whether or not the action or non-action taken by the Secretary of the Treasury under paragraph I was or was not one of the facts actually or necessarily affecting and thus one of the various factors upon which the collector based his decision.

The Government strenuously insists that the thing sought to be reviewed is in fact a decision of the Secretary of the Treasury, and that the particular decision was not a factor upon which the collector based his liquidation.

It may be true as the Government asserts that upon this record the concluding language of the Secretary's letter, "you will therefore liquidate entries Nos. 39843 and 43051 on the basis of the entered values," was not a *direction* to the collector,

and that the collector did not so regard or act upon it, but acted in behest of the statute itself, as indicated by the phrase of his letter to the general appraisers stating that he acted "as required by paragraph I, section 3, act of 1913," and, therefore, that the Secretary's action was not a *direction* as to liquidation. Nevertheless, this assumed state of facts does not free the collector's liquidation or decision of any invalidity by reason of its execution during the pendency of the said proceedings before or before valid action upon the importers' petition by the Secretary. If this were true and the collector, voluntarily or accidentally, while the matter was pending before the Secretary, or before legal action by the Secretary, precipitated liquidation and thereby cut off the importers from their statutory rights, such liquidation was a denial of a statutory right of the importers, and in violation of the statutory right afforded. Illegal and void action are no action. Being advised, as he must have been by the papers of the pendency or possible pendency before Secretary of such relief proceedings, it would seem clear that any action by the collector before *valid* action by the Secretary, before the importer had "his day in court," so to speak, and before abandonment of [illegible] petition or decision thereupon by the Secretary of the character guaranteed him by the statutes, *any* liquidation by the collector must be invalid and void, in that it was made in deprivation of a statutory right of the importers, which, if duly accorded by the Secretary, may have compelled different decision by the collector. It can not be that where Congress has expressly granted an importer a mode of relief from an otherwise necessary decision of a public officer, and the importer having duly invoked that relief, that such

officer can by a judgment, which that relief may have modified, proceed to execution against him or his property prior to action upon the invoked relief. A construction that would permit such a denial or defeat of a stautory right is not to be tolerated. The language of the Supreme Court in *Campbell* v. *United States* (107 U. S., 407, 410-413) in such a status would be precisely appropriate:

> It would be a curious thing to hold that Congress, after clearly defining the right of the importer to receive drawback upon subsequent exportation of the imported article on which he had paid duty, had empowered the Secretary by regulations, which might be proper to secure the Government against fraud, to defeat totally the right which Congress had granted. If the regulations of themselves worked such a result, no court would hesitate to hold them invalid as being altogether unreasonable.
>
> But the regulations in this case are not unreasonable, nor do they impose any obstacle to the full assertion and adjustment of plaintiffs' right. It is the order of the Secretary of the Treasury forbidding the collector to proceed under these regulations or in any other mode which is the real obstacle. Is that order a defense to this action? Can the Secretary, by this order, do what he could not do by regulations—repeal or annul the law? Can he thus defeat the law he was appointed to execute, by making regulations, and then, by ordering his officers not to act under them, and not to act at all, place himself above the law and defy it?
>
> * * * * * * * * *
>
> Neither act of Congress nor any rule of construction known to us makes the claimant's right, when the facts on which it depends are clearly established, to turn upon the view which the collector, or the Secretary, or both combined, may entertain of the law upon that subject, and much less upon their arbitrary refusal to perform the services which the law imposes on them.

In either view, then, the Secretary's decision becomes and is a factor going to the validity of the collector's liquidation, and, until there has been a valid decision by the Secretary, there can be no valid liquidation or determination of the correct and and legal *amount* of duties.

I am of the opinion that the *due exercise* of the powers conferred by this provision upon the Secretary is not reviewable by the board, but, if in the exercise thereof the Secretary has either "transcended the powers conferred by statute" *or* "has proceeded on a wrong principle contrary to law" (*United States* v. *Passavant*, 169 U. S., 18, 21), in which latter case he thereby ousts himself of jurisdiction, in either case his decision is without jurisdiction and void.

Paragraph I is an express statutory power conferred upon the Secretary of the Treasury. By due petition of the importer jurisdiction is vested in the Secretary in certain cases *upon certain prescribed conditions* to relieve an importer against the duties accruing by law upon and by reason of his own entry. The history of tariff legislation shows that an urgent demand for such a law relieving importers against entered values in certain cases had been pressed upon the Congress for many decades. Various expedients to that end had been suggested, tried, and abandoned, either as opening the door to fraud, or, as shown by the Revised Statutes (secs. 3012½ and 3013) and the amending limiting act of March 3, 1875, itself further restricted to clerical error cases by section 24 of the act of June 10, 1890, by too liberal administration. After about 23 years of petition Congress in the current tariff act, after considering various proffered measures, again embarked upon a policy of broader relief in this behalf

by adopting paragraph I, caustiously in part reinvesting this right, taken from the Secretary almost a quarter of a century before, *upon expressed conditions*. The last sentence of paragraph I manifects the apprehension of Congress by requiring, whenever the Secretary grants relief thereunder at least, he shall "accompany his directions with a statement of *his conclusions* and his *reasons* therefor," no doubt in order to insure that sound reason should obtain and caprice and favoritism be avoided. The history and framework of the paragraph therefore enjoin strict adherence to its expressed conditions that its interpretation should respond to that expressed will of Congress.

The language of the paragraph expresses the several conditions of its application. For convenience of reference they may be designated as follows:

(1) *There must have been* a previous entry of goods advanced by the local appraiser and protested to reappraisement by the importers.

(2) *There must have been* a second importation of similar goods entered at a value which has been certified by the importers to be higher than the dutiable foreign market value thereof in order to meet advances made by the appraiser in the first or test case then pending on appeal to reappraisement.

(3) The importers' *"contention"* in the first case must have been subsequently *"sustained"* by a final decision on reappraisement.

(4) *It shall appear* that the action by the importer on entry was taken in good faith after due diligence and inquiry upon his part.

(5) The statute also prescribes that the Secretary must accompany his directions with a statement of his conclusions and his reasons therefor. (Whether or not compliance with (5) is a condition precedent to liquidation by the collector and therefore herein sufficiently complied with is not here in issue or necessary of decision.)

As decision is necessarily controlled by considerations appertaining to subdivision (3), discussion of obvious questions arising as to the other parts of the paragraph will, in the economy of space, be avoided except as reference may be made thereto by way of illustration.

The important inquiry at once presents itself, Are the conditional requirements "that the contention of the importer shall have been sustained," such as must be ascertained and determined by the Secretary, and, on review, be by the record so shown; or, will it suffice on review that the record show their existence without such determination by the Secretary?

The majority opinion assumes the statute requires the Secretary to determine and decide whether or not the importers' contention has been sustained and that, therefore, this decision upon that point is nonreviewable by the board and this court. It may well be doubted, I think, whether Congress confided this as a matter of determination to the Secretary, or made it a condition precedent to the exercise of the grant to him to determine the good faith of the importers, so granted only in cases where and upon the condition and when the importers' contention had been sustained, that condition being a legal one, final determination of which is for the courts. Certainly whether or not im-

porters' contention had been sustained is not a *quasi* judicial question, as asserted by the majority opinion, but a strictly legal one, and therefore not within the rule invoked by the majority. In any view it is at least a part of the *prescribed mode of procedure* by the Secretary, if not a condition precedent to exercise of any authority under the statute by him, and therefore equally a legal jurisdictional requirement.

Preliminarily it may be said that the discussion should be confined to the questions as presented by this record and not be extended to one that *might* be presented by a different record. Apropos of this it should be particularly borne in mind that the Secretary has *expressly stated* the grounds of his action. It oftentimes happens that the decision of an officer or court which otherwise might be held conclusive and as such nonreviewable, as supported by the presumption of correctness, is by virtue of some recital or averment as to jurisdictional matters rendered the subject of collateral review and reversal. In the presence of jurisdictional averments no presumptions will be indulged in support of the judgment, but it must stand or fall solely upon the strength of the record recitals. In *Galpin v. Page* (18 Wall., 85 U. S., 350, 366), the doctrine is concisely stated:

But the presumptions, which the law implies in support of the judgments of superior courts of general jurisdiction, only arise with respect to jurisdictional facts *concerning which the record is silent.* Presumptions are only indulged to supply the absence of evidence or averments respecting the facts presumed. *They have no place for consideration* when the evidence is disclosed *or the averment is made.* When, therefore, the record states the evidence or makes an averment with reference to a jurisdictional fact, it will be understood to speak

the truth on that point, and *it will not* be presumed that there was other or different evidence respecting the fact, *or that the fact was otherwise than as averred.*

See also *Black on Judgments* (vol. 1, 2d ed., sec. 275.)

In view, therefore, of the express recital by the Secretary of the reason for his decision, a different case is presented than one involving solely a discussion of the abstract statutory requirements. We are here called upon to adjudicate a case wherein the acting official recited in his decision the grounds thereof. Such a case can not be disposed of properly by a mere discussion of the statutory requirements without justifying the conclusion reached upon the record as presented.

The department action or decision as more markedly typified by its letter of July 28, 1914, is readily separable into its elementary parts:

(1) His finding of facts:

It appears that the appraiser added 20 per cent for market value on the former entries referred to, and that on appeal to reappraisement the general appraisers sustained an advance of only 5 per cent on the entered value, which was also the invoiced value.

(2) His conclusion of law from said facts:

Inasmuch as the contention of the importers was not sustained as to market value, the department must deny their application for a reduction of entered values.

(3) His action on proceeding: His declaration of the legal effect of that conclusion, or his mandate, or direction perforce of that conclusion of law, "you will therefore liquidate entries Nos. 39843 and 43501 on the basis of the entered values."

It seems clear that, *if* the Secretary's conclusion of law that "the contention of the importers was not sustained" was an erroneous one, unquestionably, then, when he for that reason ("*therefore*") denied the importers' application and declared, if he did not direct, a certain liquidation proper, he either "proceeded on a wrong principle contrary to law" by not following the prescribed procedure or "transcended the powers conferred upon him" by acting upon a state of conditions not prescribed by the act of Congress. In either case I am of the opinion the case is clearly within and ruled by a long line of decisions of the Supreme Court typified by and concisely expressed in *United States* v. *Passavant* (169 U. S., 18, 20):

Under section 7 the collector is to determine for himself the question of what is the invoice value of the goods, and in doing this he may add such charges as he considers to be dutiable, but his decision in this respect is not in the nature of an appraisement, and may be attacked by protest. And while the general rule is that the valuation is conclusive upon all parties, nevertheless the appraisement is subject to be impeached where the appraiser or collector *has proceeded* on a wrong principle contrary to law *or* has *transcended the powers* conferred by statute. *Oberteuffer* v. *Robertson* (116 U. S., 499); *Badger* v. *Cusimano* (130 U. S., 39); *Robertson* v. *Frank Bros. Co.* (132 U. S., 17); *Erhardt* v. *Schroeder* (155 U. S., 124); *Muser* v. *Magone* (155 U. S., 240).

The logic and authority of the majority opinion appears to be aptly expressed in the following passage:

A reading of the paragraph discloses that the authority which is thereby invested in the Secretary is not formal or ministerial in character but is *quasi* judicial. In the exercise of it the Secretary is called upon to inquire whether a proper certificate has

been filed by the importers at entry, whether a similar case was then pending upon appeal for reappraisement, whether the importers' "contention" therein has subsequently been sustained by a final decision upon reappraisement, and whether the action of the importers at entry was taken in good faith and after due diligence and inquiry upon their part. This requires an examination by the Secretary into the facts and circumstances of the case, and a *quasi* judgment upon the questions just enumerated. *Decatur* v. *Paulding* (14 Pet., 497, 514); *United States ex rel. Dunlop* v. *Black* (128 U. S., 40, 48). The act does not provide for an appeal from a refusal by the Secretary to direct an assessment in the exercise of this authority, nor is there any provision for preserving or reviewing the evidence upon which the Secretary may have acted in such a case, nor can it be doubted that Congress possessed the power to entrust this authority to the Secretary without granting an appeal from his decision in such cases.

No distinction therein is made between the *legal* condition which Congress has prescribed *shall exist*, to wit, the contention of the importers' having been sustained, and the *facts* Congress prescribes must be certified by the importers and those which "shall appear" to the Secretary. They are all in that opinion classed together as requiring "an examination by the Secretary into the *facts and circumstances* of the case, and a *quasi* judgment upon the questions just enumerated." This view loses sight of the very marked and always controlling distinction observed by all the authorities, as to the conclusiveness of decision, in the determination of a matter of law as distinguished from a matter of fact when decision is confided to an administrative officer by Congress. The latest pertinent expression at hand was by the Supreme Court in *American School of Magnetic Healing* v. *McAnnulty* (187

U. S., 91). Therein the Revised Statutes provided (sec. 3929), "The Postmaster General may, upon evidence satisfactory to him that any person is engaged in * * * any other scheme or device for obtaining money through the mails by means of false or fraudulent pretenses," etc., exclude letters from the mails, etc. After full hearing and finding "upon evidence satisfactory to him" that the defendant was engaged in such practices by the Postmaster General such an order was made. Direct action was brought for permanent injunction. The right of the courts to review the action of the Postmaster General under such an investmnet by Congress was contested. The Supreme Court held that as the determination of what was or was not a "fraud" was a decision of a question of law such a decision was reviewable, saying:

That the conduct of the Post Office is a part of the administrative department of the Government is entirely true, but that does not necessarily and always oust the courts of jurisdiction to grant relief to a party aggrieved by any action by the head or one of the subordinate officials of that department which is *unauthoried by the statute* under which he assumes to act. The acts of all its officers must be justified by some law, and *in case an official violates the law* to the injury of an individual the courts generally have jurisdiction to grant relief.

* * * * * * * *

The facts, which are here admitted of record, show that the case is not one which by any construction of those facts is covered or provided for by the statutes under which the Postmaster General has assumed to act, and his determination that those admitted facts do authorize his action is a clear mistake of law as applied to the admitted facts, and the courts, therefore, must have power in a proper proceeding to grant relief. Otherwise, the individual

is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthoried by any law and is in violation of the rights of the individual. Where the action of such an officer is thus unauthoried he thereby violates the property rights of the person whose letters are withheld.

Whether or not the importers' "contention was sustained" seems so obviously a question of law that discussion seems trite.

Equally it would seem that the assumption in the majority opinion that "the act does not provide for an appeal from a refusal by the Secretary to direct an assessment in the exercise of this authority, nor is there any provision for preserving or reviewing the evidence upon which the Secretary may have acted in such a case," is without support in principle in the state of the law. The consideration is an important one, as it is the controlling point of the decisions relief upon and cited by the majority. The statement made, while literally correct, assumes without discussion the principal point in the case whether or not there is a legally constituted jurisdiction to review the acts of the Secretary herein to determine whether or not he herein acted beyond the law. It was, of course, unnecessary for Congress to specially provide for judicial review of the Secretary's acts herein if such remedy then existed. I think Congress has provided such.

The provision in question, paragraph I, was but one paragraph and part of the customs administrative act. It related to and its exercise affected the amount of duties chargeable upon imported merchandise. Congress in a subsequent paragraph of the same act (par. N) vested in the Board of General Appraisers jurisdiction upon protest to hear and determine all questions as to the rate and

"amount" of duties "chargeable" upon imported merchandise. And, while it is true as said in the majority opinion that paragraph I commands the collector that he "shall not in any case take a less amount of duty than the entered value," that provision is but a part of and must be read in connection with other parts of and the whole customs administrative act. This act and all parts thereof, as said by the Supreme Court in *Nichols* v. *United States* (7 Wall., 74 U. S., 122, 130), "constitute a *system*, which Congress has provided for the benefit of those persons who complain of illegal assessments of taxes and *illegal exactions of duties.*" All parts thereof must be read together, paragraph I with paragraph N, wherein it is provided that the importer "if dissatisfied with such decision" of the collector as to the rate or amount of duty chargeable may protest to the Board of General Appraisers, whose "determination shall be final and conclusive * * * and the record shall be transmitted to the proper collector, * * * *who shall liquidate the entry accordingly*," that is, as he shall be commanded. When protest is filed, then, the provisions of paragraph I are superseded by those of paragraph N and the collector thereafter reliquidates not by the command of the law of paragraph I but of the mandate issued in pursuance with paragraph N. This is true in all protest cases, and, were it not true, perforce of paragraph I the board would in all cases be powerless to order reliquidation other than at the entered value. An exception is thus made by the subsequent paragraph and the earlier provisions that duty "shall not, however, be assessed in any case upon an amount less than the entered value," in paragraph I upon and in cases of protest, yields to and is superseded by the

provisions of paragraph N commanding, after final protest decision, that the collector "shall liquidate the entry accordingly." The fact that the final decision upon the protest may not *fix* the "amount" of duty to be reliquidated, but leaves that to await further determination by the collector does not alter the case, even though that determination may have to await some legal action by the Secretary of the Treasury. Perforce of paragraph N whenever protest is filed paragraph I ceases to bind the collector and he looks to paragraph N for his warrant of action.

The grant of power in the board upon protest to determine the correct amount of duties upon importations *is without limitation.* The act nowhere says that when an illegal amount levied is due to the Secretary's mandate, or any other excepting cause, the board is without jurisdiction, but the grant of power in the board is unlimited, whatever the cause or whoever causes an illegal amount of duties to be levied.

Upon due protest, challenging the amount of duty levied, the determination of the legal duty carries with it the power of inquiry and decision by the board as to all legal performances the result of which entered into and affected the amount of duties levied and covered by the protest.

That is precisely the view taken by the Supreme Court in *United States* v. *Passavant* (169 U. S., 16). The court therein read together the provisions of the customs administrative act of 1890, which is this act in all essential particulars, and held that while section 13 made reappraisements by a reappraisement board final and conclusive, nevertheless section 14, providing for protest before a classification board as to the "amount" of duties, vested juris-

diction in the latter to inquire into the *legality* of the proceedings of the reappraisement board whose decision was made by the very act "final and conclusive."

It follows that it is a pertinent and necessary inquiry by the Board of General Appraisers, before whom is duly challenged the "*chargeable*" "*amount*" of duties upon an importation, in the customs administration of which the importers have invoked the provisions of paragraph I, whether or not valid decision by the Secretary thereupon has been had and duly observed by the collector.

Did the action or non-action of the Secretary herein affect or enter into the legally chargeable duties?

I think the answer to that question must be in the affirmative. By paragraph X of section 3 of the customs administrative act as amended in 1913 the Board of General Appraisers is vested with jurisdiction of all appeals from decisions of collectors of customs "as to the rate and amount of duties chargeable upon imported merchandise." There is here no issue as to the rate of duty; there is here issue as to the amount of duty "chargeable." The merchandise was invoiced at 1,665.40 francs, entered at 1,986.48 francs, and appraised at 1,738.17 francs. The amount of duty "chargeable" depends entirely upon which of these items is the proper basis of assessment.

If I am correct in this view it renders inapplicable the reasoning and authorities cited in support of the majority opinion, which assume and are applicable solely in cases where *no review is provided by law* of the power granted the Secretary. Thus, in *Decatur* v. *Paulding* (14 Pet., 39 U. S., 497, 515), relied upon, the court expressly pointed out that it

was reviewing a mandamus proceeding to compel strictly ministerial acts wherein no review was provided. The court said:

If a suit should come before this court, which involved the construction of any of these laws, *the court certainly would not be bound to adopt the construction given by the head of a department.* And if they supposed his decision to be wrong, they would, of course, so pronounce their judgment. But their judgment under the construction of a law must be given *in a case in which they have jurisdiction, and in which it is their duty to interpret the act of Congress*, in order to ascertain the rights of the parties in the cause before them.

The distinction was emphasized in *United States ex rel. Dunlop* v. *Black* (128 U. S., 40, 47), wherein the *Decatur* v. *Paulding* case was quoted with approval. These two are the cases relied upon by the majority opinion. I can better leave their interpretation to the words of Mr. Justice TAFT, with whom concurred Mr. Justice LURTON and Mr. Justice CLARK, in *D. M. Ferry & Co.* v. *United States* (85 Fed., 550, 556), stating:

The case before us is very like *United States* v. *Black* (128 U. S., 40, 9 Sup. Ct., 12). * * * The Supreme Court held that where Congress vested in an executive officer the power to hear and determine claims against the Government of the United States, *with no provision for an appeal to the courts*, his decision was final in so far as to prevent a direct review of the same by the proceeding in mandamus to compel the officer to act in accordance with the view of the law which the court might take. * * * The court, in *United States* v. *Black*, followed an earlier decision of *Decatur* v. *Paulding* (14 Pet., 497), and made very clear, by reason and authority, the distinction between the mere ministerial act of the executive officer, which may be controlled by the courts by mandamus, and an act in the performance of which an officer is vested with quasi judicial discretion. * * * In *Decatur* v.

Paulding (14 Pet., 497) it was expressly stated by the court that while, as between the United States and the pensioner, the Secretary of the Navy was the final tribunal for the construction of the statute, yet, *if the question were to arise between two litigants in such a way that the court would have jurisdiction over the controversy, the court would not feel bound to follow the construction of the Secretary.* And so, in this case, if by any possibility the question of the construction of this particular section 2984 were to come before the Circuit Court in a matter of which it had jurisdiction, it would not be bound to follow the construction of the Treasury; but the question here is whether, in a direct proceeding against the United States, and not in a suit of which the court otherwise has jurisdiction, the decision of the tribunal appointed by law can be reviewed by the court.

These decisions are express authority that where a review is provided by law of proceedings performed by special tribunals all judicial acts performed by such will be reviewed.

In my view the procedure of review established by paragraph N, part of the act in question, renders both the reasoning and authorities cited more conducive to the contrary than the view of the majority.

Aside from the *Passavant* case, *supra,* these principles have in numerous similar instances been applied to the same effect.

That long and uniform line of decisions by the Supreme Court to the effect that while the *decision* itself of appraisers and boards thereof in valuation or appraisement cases can not, by reason of their quasi judicial character *and the express statutes making them final and conclusive upon all the world,* be reviewed by a classification or law board of general appraisers or the courts, yet that the latter tribunals can inquire into such proceedings

to ascertain if the appraisers in reaching appraisement decision had "transcended the powers conferred by statute" or "has proceeded on a wrong principle contrary to law," seems to me so nearly allied to this and so exactly in point as to the law of the case that the court should deem it controlling.

The judicial function so exercised is not the review of the *decision* of a quasi judicial officer. That principle as announced in *Bates & Guild Co.* v. *Payne* (194 U. S., 106, 108) and cases therein reviewed is without question, but differs vastly from a judicial examination of the record of the proceedings of such an officer to determine whether or not in reaching decision he failed to pursue the statute whereby he either "transcended the powers conferred" upon him or "proceeded on a wrong principle contrary to law" in reaching decision. The principle was early approved and adopted by this court in *Maddaus* v. *United States* (3 Ct. Cust. Appls., 330, 332; T. D. 32623), wherein it is said:

We do not think the added language in section 13 of the customs administrative law, as amended in 1909, concerning the finality of the decision of appraisers in reappraisement cases, changes the rule where either the "appraiser or collector has proceeded on a wrong principle contrary to law or has transcended the powers conferred by statute," as declared by the Supreme Court in *United States* v. *Passvant* (169 U. S., 16, 21). The changed language of the statute is addressed to a review of "the decision" itself rather than to the jurisdiction of the board to render the decision. The injunction of the statute is against a review of the decision as a finding of fact, and not to the procedure of the board in acquiring jurisdiction to render the decision, which is a question of law. The statute entitles the importer, or the Government, to an appraisement by a single general appraiser or a board of general appraisers *proceeding according to law.*

The decision thus had become final and neither the board nor this court can review the same. Until, however, the jurisdictional requirements of the statute have been complied with or satisfied there is no "decision" within the statute of a single general appraiser or a board of three general appraisers. The review sought, therefore, is not a review of the decision itself, but a review of the legal power of the general appraiser or board of general appraisers to render that which without such power duly exercised does not become the "decision" contemplated and made final by the provisions of the statute.

Application of that doctrine by the Supreme Court, wherein a protest before the Board of General Appraisers, on its classification or law side, though immediately directed at and attacking the collector's liquidation or decision, raises an issue determinable by that board, and on appeal by the courts, wherein is involved the legality of some decision, order, regulation or action of the Secretary of the Treasury, directly or indirectly affecting such liquidation or decision of the collector, is had as controlling in numerous decisions. *United States* v. *Lucius Beebe & Sons* (122 Fed., 762), *Morrill* v. *Jones* (106 U. S., 466), *United States* v. *Whitridge* (197 U. S., 135), *Lenning* v. *Maxwell* (3 Blatch., 125), *Greely* v. *Thompson et al.* (10 How., 51 U. S., 241, 254), *Tracy* v. *Swartwout* (10 Pet., 35 U. S., 80, 95), *Downs* v. *United States* (187 U. S., 496), *Marriott* v. *Brune et al.* (9 How., 50 U. S., 619, 634), *Earnshaw* v. *Cadwalader* (145 U. S., 247, 259), *American Sugar Refining Co.* v. *United States* (1 Ct. Cust. Appls., 228; T. D. 31273), *Tilge* v. *United States* (1 Ct. Cust. Appls., 462; T. D. 31507), *Morris European & American Express Co.* (3 Ct. Cust. Appls., 146, 149), *Loeb* v. *United States* (1 Ct. Cust. Appls., 385), *Maddaus* v. *United States* (3 Ct. Cust. Appls., 330). And special atten-

tion is directed to an exceedingly able and pertinent decision of the subject by the late Judge SOMERVILLE in *United States* v. *Loeb* (99 Fed., 723).

A precisely parallel course of decisions is those confirming jurisdiction in the board to review clerical error cases wherein Congress by section 24 of the customs administrative act of 1890 reenacted in the present act as paragraph Y of section 2, provides:

Y. * * * And the *Secretary of the Treasury is hereby authorized to correct manifest clerical errors* in any entry or liquidation for or against the United States, at any time within one year of the date of such entry, but not afterwards: * * *.

That jurisdiction was first exercised by the board in G. A. 184 (T. D. 10534), December 5, 1890, which decision was affirmed by the United States Circuit Court at Chicago and acquiesced in by the Treasury Department September 10, 1891 (T. D. 11746). In 1894 the board, in G. A. 2575 (T. D. 14946), again reasserted this jurisdiction, saying:

It is perfectly clear to us that section 24 of the customs administrative act has no bearing on this case. That section confers on the Secretary of the Treasury general power "to correct manifest clerical errors in any entry or liquidation for or against the United States" at any time within one year of the date of entry. The provisions of the section show that the Secretary can exercise this authority for the purposes there mentioned, after final liquidation of the entry, even in cases where no appeal has been taken to this board from the collector's decision.

The authority to correct such errors is not vested in him as an exclusive power, and this point has been decided by the courts. The power conferred on the Board of General Appraisers by section 14 of said act to "examine and decide" all cases properly before them for decision necessarily carries with it the power to correct an obvious and manifest

clerical error appearing in the papers which make up the case as a part of the record.

This jurisdiction was exercised by the board *In re Magnus*, G. A. 184 (decided Dec. 5, 1890), which decision was affirmed by the United States Circuit Court for the Northern District of Illinois (per BLODGETT, *Judge*) in August, 1891. That decision was acquiesced in by the Treasury Department September 10, 1891 (Synopsis 11745), on the concurrence of the Attorney General, who advised against appeal.

To the same effect is *United States* v. *Benjamin et al.* (72 Fed., 51) and *Gillespie et al.* v. *United States* (124 Fed., 106), both approved by this court in *United States* v. *Swedish Produce Co.* (4 Ct. Cust. Appls., 223; T. D. 33437), and frequently thereafter. Congress meanwhile has repeatedly reenacted this paragraph in hæc verba, thereby legislatively approving said interpretations.

The case of *D. M. Ferry & Co.* v. *United States*, *supra*, by Mr. Justice TAFT, may well conclude this branch of the case. It is to the effect that while Congress undoubtedly has the power to confer upon the Secretary of the Treasury quasi judicial functions without appeal or review, when such review is afforded by statute, the tribunal possessing such jurisdiction "would not be bound to follow the construction of the Treasury."

But it is held by the majority that this protest challenges only the decision of the collector, whereas it is a decision of the Secretary of the Treasury that is, in fact, sought to be challenged.

That regulations of and directions by the Secretary of the Treasury can be questioned in actions directed against the collector and his liquidations and that orders and directions of the Secretary are no defense for the collector in such cases has been so long established and often adjudicated that the

principle would seem to be *stare decisis*. In *Tracy* v. *Swartwout* (10 Pet., 35 U. S., 80, 95) the Supreme Court said:

The collector of the customs is a ministerial officer; he acts under the instructions of the Secretary of the Treasury, who is expressly authorized to give instructions as to the due enforcement of the revenue laws. Do these instructions, *when not given in accordance with the law*, afford a justification to the collector or exonerate him from the payment of adequate damages for an injury resulting from his illegal acts? The Circuit Court, in their charge to the jury, did not consider these instructions as a justification to the defendant, and in this they were unquestionably correct. The Secretary of the Treasury is bound by the law, and although in the exercise of his discretion he may adopt necessary forms and modes of giving effect to the law, yet *neither he nor those who act under him* can dispense with or alter any of its provisions. It would be a most dangerous principle to establish, that the acts of a ministerial officer, when done in good faith, however injurious to private rights *and unsupported by law*, should afford no ground for legal redress.

The rule was reaffirmed in *Greely* v. *Thompson et al.* (10 How., 51 U. S., 225, 234) as follows:

The orders as well as the opinions of the head of the Treasury Department, expressed in either letters or circulars, are entitled to much respect, and will always be duly weighed by this court; but it is the laws which are to govern, rather than their opinion of them, and importers, in cases of doubt, are entitled to have their right settled by the judicial exposition of those laws rather than by the views of the department. *Marriott* v. *Brune* (9 How., 634, 635). And though, as between the customhouse officers and the department the latter must by law control the course of proceeding (5 Stat. at L., 566), yet, as between them and the importer, *it is well settled that the legality of all their doings may be revised in the judicial tribunals. Tracy et al.* v. *Swartwout* (10 Pet., 95); *United*

States v. *Lyman* (1 Mason, C. C., 504); *Opinions of Attorneys General* (1015).

In *United States* v. *Beebe et al.* (117 Fed., 670, 680) is found a recent concise statement of the principle:

With respect to section 2652 of the Revised Statutes, it may be observed that, although the collector must carry into effect all instructions of the Secretary of the Treasury relative to the execution of the revenue laws, yet as to third persons the legality of the collector's action is open to judicial review. *Greely* v. *Thompson* (10 How., 225, 234, 13 L. Ed., 397); *Tracy* v. *Swartwout* (10 Pet., 80, 95, 9 L. Ed., 354).

This case was affirmed by the Circuit Court of Appeals, First Circuit, in *United States* v. *Lucius Beebe & Sons* (122 Fed., 762, 769) with the following pertinent comment:

The United States raise a question of the jurisdiction of the Board of General Appraisers. On that point we need add but very little to what was said in the Circuit Court. The act of June 10, 1890, chapter 407 (26 Stat., 131), is the law which established this tribunal. The United States rest on the words "decision of the collector," found in section 14, and they claim that in the case at bar the "decision" was not that of the collector of Boston, but of the Secretary of the Treasury. This is a narrow construction of the expression, because the ultimate tribunal which reliquidated was not the Secretary, but the collector, so that at common law mandamus would lie only against the latter, and not against the former. This position, moreover, begs the question, because, *if the action of the Secretary was unlawful, as we hold it was, the collector could rest nothing done by him on that action, and whatever he did was his own.*

The United States rely on *United States* v. *Klingenberg* (153 U. S., 93, 14 Sup. Ct., 790, 38 L. Ed., 647). The opinion in that case is a very elaborate one, growing out of lack of compliance with the

statutes on the part of the importer at the very origin of the transaction; that is, when he took his invoice. Several things said in it may be regarded as dicta; but, however that may be, *United States* v. *Passavant* (169 U. S., 16, 18 Sup. Ct., 219, 42 L. Ed., 644) must be held to broaden the view of the jurisdiction of the Board of General Appraisers when there is involved a mere question of law, such as arises at bar on the letter of instructions from the Secretary to the collector.

A useful discussion of the general power of the courts to revise questions of law *arising on the face of the proceedings* by executive departments will be found in *American School of Magnetic Healing* v. *McAnnulty* (187 U. S., 84, 23 Sup. Ct., 33, 47 L. Ed. —). We also refer to *Hyatt* v. *Corkran* (188 U. S., 691, 23 Sup. Ct., 456, 47 L. Ed. —).

While these decisions were reversed by the Supreme Court in *United States* v. *Whitridge* (197 U. S., 135), it was upon an entirely different point than that raised, discussed or decided at circuit, and the well-considered and supported doctrine of the courts below may well be deemed authority on the points decided.

Morrill v. *Jones* (106 U. S., 466) seems precisely in point. Therein the Secretary *by regulation*, in exercise of a power conferred by Congress upon him, "upon proof thereof satisfactory to the Secretary of the Treasury," directed collectors to admit only certain limited classes of stock. In a suit against a collector, the regulation of the Secretary was reviewed and held to transcend the powers granted by Congress and void. To the same effect is *Bowling Green Storage & Van Co.* v. *United States* (3 Ct. Cust. Appls., 309; T. D. 32588).

So, prior to the customs administrative act of 1890, protests on appeal were decided by the Secretary and the collector's reliquidation was just as much in obedience to a decision committed by law

to the Secretary as here; nevertheless review of the Secretary's action was by suit against the collector. In *Nichols* v. *United States* (7 Wall., 74 U. S., 122, 130), it was said:

In the administration of the tariff laws, as we have seen, the Secretary of the Treasury decides what is due on a specific importation of goods, but, if the importer is dissatisfied with this decision, he can contest the question in a suit against the collector, if, before he pays the duties, he tells the officers of the law, in writing, why he objects to their payment.

The case of *United States* v. *Whitridge* (197 U. S., 135) is a conspicuous example of review of the legality of an order expressly confined by statute to the power of the Secretary of the Treasury in a case arising upon protest to the Board of General Appraisers. The court expressly refused to follow a technicality upon which decision could be rested that the Secretary's action was not reviewable, and under the assumption that it was such, on an appeal from protest against a collector's decision, reviewed and decided the case.

Likewise, the numerous cases reviewing reappraisement proceedings review and decide upon the legality of the proceedings of general appraisers and boards thereof, and that upon protest against the liquidation or decision of the collector *legally required to be made according to the board's decision.*

Finally, upon the question of the jurisdiction of the board and its power to review upon protest the legal acts of the Secretary when exercised as affecting the rate and amount of duties upon imported goods:

(1) The customs administrative law is a code of laws all parts of which were enacted and must be

construed together. *Nichols* v. *United States* (7 Wall., 74 U. S., 122, 130).

(2) Paragraph M of that act provides for valuation decisions upon appeal to general appraisers and boards thereof and that such decision by a board "shall be final and conclusive against all parties and shall not be subject to review in any manner for any cause in any tribunal or court." It is settled that by protest under paragraph N jurisdiction is vested in the board to review and decide whether or not in reaching such decision such boards proceeded according to law. *United States* v. *Passavant* (169 U. S., 16); *Maddaus* v. *United States* (3 Ct. Cust. Appls., 330; T. D. 32623).

(3) Paragraph Y of that act provides that "the Secretary of the Treasury is hereby authorized to correct manifest clerical errors in any entry for or against the United States," etc. It is well settled that the Board of General Appraisers by Paragraph N is vested with jurisdiction on protest to hear and determine clerical error claims and the collector to reliquidate accordingly. *United States* v. *Swedish Produce Co.* (4 Ct. Cust. Appls., 223; T. D. 33437).

(4) Paragraph I provides that the collector shall determine for himself the invoice value and add thereto such charges as he may deem dutiable. Nevertheless it is well settled that the board by Paragraph N is vested with jurisdiction on protest to review this action of the collector. *United States* v. *Passavant* (169 U. S., 16).

If Paragraph N vests in the board the powers therein granted in unlimited terms to determine the *amount* of duty upon protest whenever and however and by whomsoever determined in all other provi-

sions of the act, then why not also as to this provision of paragraph I? Certainly all parts of paragraph I are equally parts of the act, and accordingly must be read in connection therewith and as modified thereby. In my view the powers and jurisdiction of the board are plenary to review the proceedings of the Secretary of the Treasury under this paragraph to determine whether or not he acted in a case not authorized by law, or being authorized by law to proceed, proceeded contrary to law. Did he so act or proceed?

Did the state of facts found by the Secretary, from which he drew the conclusion of law that the importers had not sustained their "contention," and "therefore" denied their petition for relief, warrant that conclusion of law?

Concretely stated, given an invoice for $1, advanced by the appraiser to $1.20, protested by the importer (by protesting to reappraisement in form prescribed by the Secretary, reciting "we consider the appraisement * * * too high"), and, on reappraisement, fixed at $1.05, *query,* can it be said as a matter of law that the importer's "contention" was "sustained"?

Diligent search has failed to discover authority of value in this ascertainment. We are left, therefore, to such guides of interpretation as are afforded. Primarily the legislative purpose is not obscure but made perfectly plain by the hearings before Congress and the words of the paragraph. (Tariff Hearings, Committee on Ways and Means, 1913, Vol. VI, pp. 6170-6171, 6179, 6217-6218, 6222, 6249, 6254-6256, 6323-6324.)

It was to relieve the importer from the legal consequences of his entry as visited by the statute where in good faith he believed the market value of

goods other than the invoiced value. The hearings and the paragraph itself indicate the provision prompted by a situation of uncertainty as to market value and to give an importer time to try out this question on an initial invoice and entry before being bound and penalized by subsequent entries.

While the necessity for an enactment of the statute assumes such uncertainty or want of information the Government's position requires of the importer to declare with certainty at the assumed time of uncertainty and to point out exactly by his protest the true market value at that time to the fraction of a cent. If Congress assumed the importer would be then possessed of that information this enactment is an idle one.

If the importers' contention is not sustained, unless the protests precisely state the value subsequently found by the board, there is, under all the circumstances of market value and its determination imposed upon him, a well-nigh impossible task. The construction, therefore, would readily render the paragraph of little or no operation, and hence is not to be adopted.

Nor is that the theory of the long-established practice in reappraisement cases. The Secretary of the Treasury by regulation prescribes the contents of the protest or appeal to reappraisement by the importer that the appraisement is "too high," and of the collector that the appraisement is "too low." Customs Regulations of 1915 (arts. 586 and 587). Forms accordingly are prescribed. Under such for many years proof of any value by either party has been permitted and any range of values proven to and found by the board. As a matter of fact, such an appeal to reappraisement vacates the appraisement appealed from and warrants an appraisement

de novo wherein proof and findings are without limitation of range. So, proof of *any* less than the appraised value literally supports, and a finding of any less than appraised value is literally within, the declaration or protest that an appraised value is "too high." Comparison may be had of a complaint or declaration alleging due A from B of $120. Certainly proof would be admissible and a finding and judgment sustained as within such pleadings that $105 or less were due. Even in criminal jurisprudence an indictment for grand larceny will support a conviction for petit larceny and so of indictments for many crimes, the greater involving the less. I am of the opinion, therefore, that the construction does not comport with or support the obvious purpose of Congress.

The paragraph being intended to relieve the importer of a conceded hardship, doubts as to its meaning should be resolved in his favor so as to effectuate the patent congressional purpose. *United States* v. *Gavin & Co.* (7 Ct. Cust. Appls., —; T. D. 36804), *Woolworth* v. *United States* (1 Ct. Cust. Appls., 120-122; T. D. 31119), *United States* v. *Hatters' Fur Exchange* (1 Ct. Cust. Appls., 198-202; T. D. 31237), *United States* v. *Matagrin* (1 Ct. Cust. Appls., 309-312; T. D. 31406), *United States* v. *Harper* (2 Ct. Cust. Appls., 101-105; T. D. 31655), *American Express Co.* v. *United States* (3 Ct. Cust. Appls., 475-479; T. D. 33121), *United States* v. *American Bead Co.* (3 Ct. Cust. Appls., 509-515; T. D. 33166), *Newhall et al.* v. *United States* (4 Ct. Cust. Appls., 134; T. D. 33410).

It seems to me, therefore, that, as a matter of law predicated upon the facts, both as shown by the record and as found by the Secretary of the Treasury, the importers herein had sustained their con-

tention and were entitled to a finding upon the facts of their application before liquidation by the collector; and that such statutory right must be deemed violated by a reliquidation or decision by the collector had before due decision of the importers' rights by the Secretary, they having duly invoked the provisions of said paragraph I.

In my view, the liquidation by the collector is, for the reasons stated, void. The importers having sustained their contention before the board, are entitled to a decision of their petition to the Secretary upon the merits. Before such is had, in my opinion, there can be no valid liquidation. The protest therefore should be sustained.

EX PARTE PARK & TILFORD, PETITIONER.

PETITION FOR WRIT OF MANDAMUS.

No. 24. Original. Argued October 15, 16, 1917.—Rule discharged November 5, 1917.

Mandamus will not issue from this court to compel a subordinate court to make a particular decision. The jurisdiction of this court in that regard is no greater in a case in which the lower court's decision is by law made final than in those in which decisions are reviewable in the ordinary ways.

The Court of Customs Appeals decided that under the last clause of paragraph I, § 3, of the Tariff Act of 1913, c. 16, 38 Stat. 114, 184, the collector was required to assess certain goods upon their entered

value, unless directed otherwise by the Secretary of the Treasury; and that the Secretary's refusal to give a contrary direction was discretionary and not reviewable by the Board of General Appraisers or by the Court of Customs Appeals; and, upon these grounds, affirmed the Board's decision. *Held*, that the court had taken jurisdiction and decided the case upon its merits and that mandamus would not lie to compel it to inquire into and pass upon the Secretary's refusal.

Rule discharged.

THE case is stated in the opinion.

Mr. Vincent P. Donihee, with whom *Mr. Edward S. Hatch* was on the brief, for petitioner.

Mr. Assistant Attorney General Warren, with whom *The Solicitor General* was on the brief, for respondents.

MR. JUSTICE DAY delivered the opinion of the court.

This is a petition for a writ of mandamus to require the Judges of the United States Court of Customs Appeals to take jurisdiction of a certain cause, and to consider and decide the same upon its merits. The rule to show cause having issued, the judges made return, and set forth the proceedings in the Court of Customs Appeals, and averred that the court had decided the case of the petitioner, and if the writ of mandamus issued, it would only require the court to do that which it had already done.

From the return and the record attached to the petition it appears: Park & Tilford, petitioner, imported certain merchandise at the port of New York under the Tariff Act of 1913. The Collector of Customs assessed and liquidated the duties at the entered value. The importer claimed assessment at the value decided upon on final reappraisement, which was less than the amount of the

entered value. This claim was made under paragraph I of § 3 of the Act of 1913, 38 Stat. 114, 184, which provides:

"The duty shall not, however, be assessed in any case upon an amount less than the entered value, unless by direction of the Secretary of the Treasury in cases in which the importer certifies at the time of entry that the entered value is higher than the foreign market value and that the goods are so entered in order to meet advances by the appraiser in similar cases then pending on appeal for reappraisement, and the importer's contention shall subsequently be sustained by a final decision on reappraisement, and it shall appear that the action of the importer on entry was taken in good faith after due diligence and inquiry on his part, and the Secretary of the Treasury shall accompany his directions with a statement of his conclusions and his reasons therefor."

The importers entered the goods upon an invoice which stated the gross price and allowed 15% deduction therefrom; at entry the importers advanced the value by reducing the deduction to 6%. At the time of entry the importer, in each case, made an addition to the invoice value to make market value, stating the additions were made to meet advances in similar cases then pending upon appeal for reappraisement.

On appeal for reappraisement the goods were appraised at a value which differed from the invoice value, being 2½% more than invoice price of the goods, and 6½% less than the entered value.

The petitioner requested the Secretary of the Treasury to reliquidate the entries; this the Secretary refused to do, stating his reasons as follows:

"You are advised that in all cases where the importer has failed to make a specific contention as to market value, the department regards the contention as being for the invoice value; and where the final reappraised value is below the entered value, but not as low as the value

contended for by the importer, it is the practice of the department to decline to authorize a reduction of the entered value, on the ground that the importer's contention has not been sustained. This practice is based upon the department's knowledge of the purpose and intent of the law, and is of such long standing that it will not make any change therein.

"You are advised therefore that if the entries enumerated in your petition come within the class mentioned above, the department's final action with reference thereto would necessarily be in accordance with its practice outlined above."

In a subsequent letter the Secretary reiterated this view, the petitioner protested, and the protest was submitted to the Board of General Appraisers, and was overruled, and the importer appealed to the Court of Customs Appeals.

An inspection of the opinion of the court, which accompanies the petition, makes it apparent that the court did take jurisdiction of the case and decided it, placing its decision upon the ground that the statute requires the assessment made by the Collector in the absence of a direction of the Secretary of the Treasury to the contrary. The court held that the Secretary's refusal to so direct the Collector was not reviewable by the Board of General Appraisers nor by the Court of Customs Appeals; that neither the Board nor the court could control the discretion lodged by the statute in the Secretary, and affirmed the decision of the Board.

It is elementary that the writ of mandamus will not issue to require the court to make a particular decision, and may only be invoked where the purpose is to require action of a court of competent jurisdiction, where such court has refused to exercise the power of decision with which it is invested by law. We think it clear that the Court of Customs Appeals did take jurisdiction of the

case of the petitioner on appeal from the order of the Board of General Appraisers, and decided it according to its interpretation of the statutes of the United States. These facts warrant the statements of the respondents in their return—that if the writ should issue, requiring a decision of the case, they could only repeat the decision which they have already made.

The fact that the law makes the decision of the United States Court of Customs Appeals final in this class of cases does not broaden the authority of this court to issue writs of the character now invoked; it follows that the rule must be discharged.

And it is so ordered.